THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable G. Thomas Cooper, Jr., Circuit Court Judge

Circuit Court Case No. 2007-CP-40-02187

Protection and Advocacy for the People with Disabilities, Inc.; M.J.B. on behalf of and as next friend of J.B.; C.B.B. on behalf of and as guardian of P.B.; G.C. and L.C. on behalf of and as guardians of F.C.; D.P. on behalf of and as guardian of C.M.D.; K.F. and S.F. on behalf of and as next friend of A.E.; J.H. on behalf of and as next friend of A.J.; G.M. on behalf of and as next friend of E.M.; N.M. on behalf of and as guardian of E.J.M.; R.P. on behalf of and as Guardian of S.P.; R.R. and J.R. on behalf of and as guardians of K.D.R.; and J.K. on behalf of and guardian of S.S. . . . . **APPELLANTS**

v.

South Carolina Department of Disabilities and Special Needs; Dr. Beverly Buscemi, in her official capacity as Director of the South Carolina Department of Disabilities and Special Needs; and Nancy Banor, Deborah McPherson, Christine Sharp, Rick Huntress, Fred Lynn, Harvey Shiver and Kelly Hanson Floyd, as Commissioners of the South Carolina Department of Disabilities and Special Needs . . . . . **RESPONDENTS**

RECORD ON APPEAL

Volume II

[counsel listed on following page]

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PROTECTION AND ADVOCACY FOR THE PEOPLE WITH DISABILITIES, INC., ET AL v. S.C. DEPT. OF DISABILITIES AND SPECIAL NEEDS
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Attachment 1 to Appendix D–3, South Carolina's Mental Retardation/Related Disabilities (MR/RD) Waiver Document (Effective October 1, 2004–September 30, 2009).

The second and third eligibility criteria are commonly referred to collectively as "Level of Care." These criteria describe the minimum services and functional deficits necessary to qualify for Medicaid-sponsored institutional care in an ICF/MR. South Carolina's waiver application provides that Level of Care reevaluations will take place at least every twelve months. [FN4] Appendix D–2, South Carolina's Mental Retardation/Related Disabilities (MR/RD) Waiver Document (Effective October 1, 2004–September 30, 2009). South Carolina's waiver application with the federal government does not include any age-of-onset requirement and reveals no intent to vary from or otherwise limit the group of individuals encompassed by the SSI definition of mental retardation. On the waiver application in effect in 2005, South Carolina ***67** checked letter "f," thereby expressing its intent to provide waiver services to the group identified as "mentally retarded persons and persons with related disabilities." In addition, where asked whether it would impose any " addition[al] targeting restrictions" on the provision of waiver services, South Carolina stated "Not applicable."

> FN4. South Carolina filed a Request for a Renewal to a § 1915(c) Home and Community–Based Services Waiver (Effective January 1, 2010) and a Request for an Amendment to a § 1915(c) Home and Community–Based Waiver (Effective March 1, 2011). However, neither the renewal or amendment waiver application altered the Level of Care evaluation criteria or frequency.

In 1990, the South Carolina General Assembly adopted a definition of mental retardation that parallels the SSI definition adopted by the federal government in 1985. *See* Act. No. 496, 1990 S.C. Acts 2184, 2187; 50 Fed.Reg. 35038, 35068–69 (Aug. 28, 1985). The definition, codified at South Carolina Code section 44–20–30, states that mental retardation is "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period." [FN5] The term "developmental period" was ****608** new to the 1990 definition, and it is upon the construction of that term that this matter largely turns.

> FN5. Prior to the 1990 Act, South Carolina defined a "mentally retarded person" as "any person, other than a mentally ill person primarily in need of mental health services, whose intellectual deficit and adaptive level of behavior require for his benefit, or that of the public, special training, education, supervision, treatment, care or control in his home or community, or in a service facility or program under the control and management of the Department." S.C.Code Ann. § 44–21–30 (1976).
>
> Subsequent to the briefing and arguments in this case, the General Assembly, in 2011 Act No. 47, changed the references to mental retardation in section 44–20–30 to "intellectual disability." Although the definition of intellectual disability is the same as it was for mental retardation, it has been moved to subsection 12 of section 44–20–30. To ensure our references are consistent with the record in this case, we will continue to use the terminology in effect at the time this case arose and was argued.

[1] DDSN promulgated a regulation which recites the SSI/44–20–30 definition of mental retardation (with only minor changes in phrasing) and defined the term "developmental period" as the period from conception to age twenty-two, consistent with the SSI definition. [FN6] 26 ***68**S.C.Code Ann. Regs. 88–210(F) (Supp.2010). Thus the definition of mental retardation under state law—Regulation 88–210(F)—mirrors the SSI definition with

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respect to the age-of-onset requirement. No South Carolina regulation imposes additional diagnostic criteria for mental retardation in the context of waiver services. Nevertheless, DDSN attempted through a "Policy of Determination of Eligibility" to impose more restrictive diagnostic criteria for mental retardation for eligibility for waiver services in the form of an age-eighteen-onset requirement for mental retardation. The policy states:

> FN6. Chapter 88 of the South Carolina Code of Regulations draws its statutory authority from title 44, chapter 20 of the South Carolina Code. While chapter 88 continues to list its statutory authority as article 3 of chapter 21, title 44 of the 1976 Code, that article was repealed in 1990. The relevant statutory provisions were reenacted as article 5 of chapter 20. This change was part of the same act that adopted the new definition in section 44–20–30. 1990 S.C. Acts 2184, 2200–04. Notably, while the pre–1990 definition of mental retardation applied only to the article of title 44 in which it was located, the new definition in section 44–20–30 explicitly applied to the entire chapter. Thus, the General Assembly manifested its intent that the definition in section 44–20–30 would apply to the licensing provisions interpreted in chapter 88 of the South Carolina Code of Regulations. Those regulations dictate that the developmental period extends to age twenty-two. In the more than twenty years following these changes in the law, DDSN has not altered the regulations to reflect a contrary view.

DDSN evaluates referred individuals in accordance with the *definitions of Mental Retardation outlined in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders* –Fourth Edition (DSM–IV, 1994) and the *American Association on Mental Retardation* (AAMR 9th Edition, 1992).

Mental Retardation refers to substantial limitations in present functioning. *Diagnosis of mental retardation based on the DSMIV and AAMR definitions* requires the following three criteria be met:

....

3. *The onset of mental retardation is before age 18 years.*

South Carolina Dep't of Disabilities and Special Needs Policy for Determination of Eligibility Guidelines to Operationalize Eligibility Policy (Effective July 1, 1998) (emphasis added).[FN7]

> FN7. In ignoring Regulation 88–210 and finding DDSN's policy guidelines properly supplied more specific criteria outside the waiver application, the dissent acknowledges the fact that DDSN's policy guidelines are not regulations promulgated by a state agency; yet the dissent finds the policy guidelines are entitled to deference in interpreting section 44–20–30. In accordance with our statutory law, we hold an agency guideline does not have the force of law, and in any event, can never trump a regulation. Our law provides that " '[r]egulation' means each agency statement of general public applicability that implements or prescribes law or policy or practice requirements of any agency. *Policy or guidance issued by an agency other than in a regulation does not have the force or effect of law.*" S.C.Code Ann. § 1–23–10(4) (2005) (emphasis added). Thus, because the age-eighteen-onset requirement found in DDSN's policy guidelines has not been formally adopted as a regulation, it does not have the force and effect of law and is entitled to no deference. Indeed, the only South Carolina law addressing the age onset requirement is Regulation 88–210.

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*69 II.

FACTUAL/PROCEDURAL HISTORY

Jane Doe was born on March 24, 1983, the product of an indisputably complicated birth. She was born at thirty weeks gestation, weighing just two pounds, three ounces. At ten months old, she was diagnosed with cerebral palsy, and her doctors diagnosed her with a seizure disorder at age eleven. As a result of her conditions, she has limited use of her left hand, difficulty with balance, and **609 an awkward gait. Additionally, Doe presents with other physical and emotional conditions, including the nerve disorder Reflex Sympathetic Dystrophy, anxiety, depression, and anger management problems.

In 2001, Doe applied for SSI benefits from the SSA. The psychological evaluation submitted to the SSA showed her Full Scale Intelligence Quotient (IQ) to be sixty-nine, Verbal IQ to be seventy-seven, and Performance IQ to be sixty-five. Using these scores and personal observations of Doe's functional abilities, the doctor examining her concluded "[s]he has multiple physical, mental, and emotional impairments, including cerebral palsy with left spastic hemiparesis and Mild Mental Retardation." The SSA awarded Doe SSI based on a primary diagnosis of mental retardation and a secondary diagnosis of cerebral palsy. That determination has never been challenged.[FN8] Respondent South Carolina Department of Health and Human Services (HHS) and its agent, DDSN, sought reimbursement from the federal government for services *70 they supplied using the diagnostic code for mental retardation.

> FN8. In other litigation involving Doe, the United States Court of Appeals for the Fourth Circuit noted that Doe "has developmental disabilities including epilepsy, mild mental retardation, and cerebral palsy." *Doe v. Kidd,* 501 F.3d 348, 351 (4th Cir.2007).

Doe is unquestionably disabled. Looking to her IQ scores beginning at age twelve, Doe's full-scale IQ scores ranged from a low of sixty-six to a high of seventy-three.

DDSN approved Doe's application for waiver services in March 2003, and provided her with HCBS. Because Doe's parents were unable to care for her at home, DDSN placed Doe in a Community Training Home II (CTH II) facility operated by the Newberry County Disabilities and Special Needs Board.[FN9]

> FN9. A CTH II is not an ICF/MR facility; it is classified as respite care rather than institutional care. Patients in a CTH II receive twenty-four hour supervision and some training depending on their assessed needs and care. A CTH II facility has one to two staff responsible for up to four individuals. During the pendency of this appeal, DDSN agreed to continue providing Doe HCBS benefits.

In 2005, DDSN re-evaluated and terminated Doe's eligibility for waiver services. Doe contended her benefits should not be terminated and requested a fair hearing to review that decision pursuant to 42 U.S.C. § 1396a(a)(3) (2006) and section 126–380 of the South Carolina Code of Regulations. Relying on DDSN's definition of mental retardation in its policy guidelines that the onset of mental retardation must occur prior to age eighteen, the Hearing Officer referenced "accepted psychological doctrine" and concluded Doe was not mentally retarded.[FN10] Finding the absence of mental retardation (and related disability) dispositive, the Hearing Officer did not reach the issue of whether Doe met the Level of Care requirements for waiver services eligibility. The ALC affirmed the Hearing Officer. This appeal followed.

> FN10. The hearing officer further determined that Doe did not meet the definition of a related disability. Because we conclude the hearing officer applied the incorrect definition of mental retardation, we need not reach Doe's separate challenge to the

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related disability finding.

III.
STANDARD OF REVIEW

Our standard of review is governed by the Administrative Procedures Act. S.C.Code Ann. § 1–23–380(5) (Supp.2010). *71 The Court may affirm the agency's decision, remand the matter, or reverse or modify it

> if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> (a) in violation of constitutional or statutory provisions;
>
> (b) in excess of the statutory authority granted of the agency;
>
> (c) made upon unlawful procedure;
>
> (d) affected by other error of law;
>
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
>
> **610 (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Id. We reverse because the decisions of the Hearing Officer and ALC are controlled by an error of law.

IV.
LAW/ANALYSIS
A.

[2] It is Doe's position that the SSA determination of disability and receipt of basic Medicaid through SSI is binding on DDSN's determination of whether she is entitled to receive waiver services. In the alternative, Doe argues it was error to impose an age-eighteen-onset requirement in determining whether she is mentally retarded and that DDSN must use the age-twenty-two-onset definition of mental retardation.

We disagree that, in the context of waiver services, DDSN is bound by the SSA's determination that Doe is disabled, for Doe conflates her entitlement to basic Medicaid services by virtue of her SSI disability with the issue of whether she is eligible to receive HCBS through the optional Medicaid waiver program. The federal government has made it manifestly clear that states have wide discretion in designing a waiver program that is tailored to the needs of the particular state. For example, in the "Application for a § 1915(c) Home and Community–Based Services Waiver" promulgated by the Centers*72 for Medicare & Medicaid Services, the purpose of the HCBS Waiver Program is as follows:

> The Medicaid Home and Community–Based Services (HCBS) waiver program is authorized in § 1915(c) of the Social Security Act. The program permits a State to furnish an array of home and community-based services that assist Medicaid beneficiaries to live in the community and avoid institutionalization. The State has broad discretion to design its waiver program to address the needs of the waiver's target population. Waiver services complement and/or supplement the services that are available to participants through the Medicaid State plan and other federal, state and local public programs as well as the supports that families and communities provide.
>
> The Centers for Medicare & Medicaid Services (CMS) recognize[ ] that the design and operational features of a waiver program will vary depending on the specific needs of the target population, the resources available to the State, service delivery system structure, State goals and objectives, and other factors. A State has the latitude to design a waiver program that is cost-effective and employs a variety of service delivery approaches, including participant direction of services.

Therefore, it is clear that states may impose additional criteria to the SSI definition of mental re-

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tardation for the purposes of waiver services eligibility, and the SSI's prior determination of Doe as mentally retarded is not binding on the state's waiver services eligibility determination of whether Doe is mentally retarded.

B.

[3] Although we reject Doe's initial argument, we do agree with her contention that it was error to impose an age-eighteen-onset requirement in determining whether she is mentally retarded. South Carolina's waiver application allows it to do one very specific thing: substitute home or community based services (HCBS) for mandatory Medicaid services with respect to a defined subset of categorically needy persons, without providing HCBS to every categorically needy person in the State. 42 C.F.R. § 440.240(b) (2010) ("The [State] plan must provide that the services available to any individual in *73 the following groups are equal in amount, duration, and scope for all recipients within the group: (1) The categorically needy ...."); *id.* § 440.250(k) (" [T]he services provided under [a] waiver [of § 440.240] need not be comparable for all individuals within a group."); *id.* § 441.301(b)(6) (requiring a waiver request to "[b]e limited to one of the ... target groups or any subgroup thereof" and defining the target groups as the aged, disabled, mentally retarded, developmentally disabled, and mentally ill). Thus, the scope of HCBS furnished under the waiver program**611 and recipient eligibility criteria are defined by the waiver application. However, South Carolina's waiver application with the federal government does not include any age-of-onset requirement.

To the extent a state is permitted to issue regulations interpreting the general eligibility requirements included in its waiver application, South Carolina regulations reveal no intent to vary from the requirement that the onset of mental retardation occur prior to age twenty-two. Rather, the only regulation addressing eligibility for HCBS states that HCBS "may be provided to Medicaid eligible persons eighteen years of age or older, who have been determined by community long term care to require a skilled or intermediate level of care." 27 S.C.Code Ann. Regs. 126–304 (1976). No South Carolina regulation imposes additional diagnostic criteria for mental retardation in the context of waiver services.

Moreover, we find DDSN's policy guidelines are not entitled to any deference in this regard. The scope of DDSN's rulemaking authority is defined by the South Carolina General Assembly, and DDSN may exercise such authority only in that manner. As discussed above, in 1990, the General Assembly adopted a definition of mental retardation in line with the SSI definition adopted by the federal government in 1985. Thereafter, DDSN promulgated regulation 88–210(F), which recites the SSI/44–20–30 definition of mental retardation and defines the term "developmental period" as the period from conception to age twenty-two, consistent with the SSI definition.[FN11] *74 Thus, the informal agency policy issued by DDSN, purporting to implement an age-eighteen-onset requirement should be disregarded in determining what classes of mentally retarded South Carolinians are entitled to Medicaid waiver services because it lacks the force and effect of law and is in direct conflict with Regulation 88–210(F), which defines the developmental period as extending to age twenty-two.

> FN11. The dissent asserts that Regulation 88–210 is inapplicable to the question before us because it refers only to licensing, not eligibility. This ignores the fact that Regulation 88–210 is an interpretation of the same statute, section 44–20–30, purportedly interpreted by DDSN's policy guidelines. We adhere to the basic principle that the same word should not be given disparate meanings within a single statutory scheme. Further, the plain language of the regulation shows that the definitions in 88–210 apply to the licensing of *all* programs "for the care, maintenance, education, training or treatment" of mentally re-

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tarded persons that operate for at least ten hours per week, unless specifically excluded. 26 S.C.Code Ann. Regs. 88–105. Nothing in the text of 88–105 or 88–210 excludes non-residential waiver services from the scope of the definitions found therein, and the dissent does not appear to contest that some of the programs subject to the definitions in 88–210 are waiver services. Therefore, in our view, Regulation 88–210 expresses the view that the term "developmental period" in section 44–20–30 has the same meaning in the context of waiver services as it does in the context of basic Medicaid services.

V.
CONCLUSION

In sum, it is clear that South Carolina *could have* listed additional criteria in the waiver application for the purpose of defining the population to whom it would provide waiver services. Likewise, DDSN *could have* promulgated regulations incorporating those additional criteria as part of the definition of mental retardation. But no such steps were taken. Rather, South Carolina adopted a broad definition of mental retardation in section 44–20–30, using language that parallels the SSI definition, and in Regulation 88–210, DDSN interpreted that definition in a manner consistent with the SSA. DDSN's interpretation of section 44–20–30 in its policy guidelines directly conflicts with Regulation 88–210 and should be disregarded.

We find the Hearing Officer and ALC erred in applying an age-eighteen-onset requirement for mental retardation. We reverse and remand for consideration of whether, applying the proper legal standard for mental retardation (onset prior to age twenty-two), Doe is eligible to continue to receive waiver services.

***75 REVERSED AND REMANDED.**

TOAL, C.J. and BEATTY, J., concur. HEARN, J. concurring in part and dissenting in part in a separate opinion in which PLEICONES, J., concurs.

****612** Justice HEARN.

Respectfully, I concur in part and dissent in part. I agree with the majority's holding that South Carolina can impose more restrictive criteria for mental retardation in its waiver application or in a regulation. Where I part company with the majority, however, is with respect to whether Regulation 88–210(F) applies in this case. Because I do not believe it does, I would find this absence of controlling statutory or regulatory criteria permitted DDSN to apply its own diagnostic criteria to Doe and would affirm.

I.

As the majority correctly notes, the starting point for our analysis is the waiver application itself. Although many states elected to supply a wide range of specific diagnostic criteria in their applications,[FN12] South Carolina has not done so.[FN13] Similarly,***76** Section 44–20–30(11) of the South Carolina Code (2002) simply defines mental retardation as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period." Due to this lack of guidance, in 1998 DDSN itself adopted the criteria from the DSM–IV and the American Association on Mental Retardation, Ninth Edition, defining mental retardation as: (1) an IQ of approximately seventy or below; (2) a score of approximately seventy or below on standardized measures of adaptive behavior; and (3) onset before the age of eighteen. These guidelines have not been promulgated into an official regulation.

> FN12. For example, Mississippi's application defines mental retardation as an IQ score of approximately seventy or below, age of onset prior to age eighteen, and a determination of deficits in adaptive behavior. Application for 1915(c) HCBS Waiver, Mississippi, App. B–6(d). Alaska defines the condition as an IQ of less than seventy, plus or minus five points; age of

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onset prior to age twenty-two; and "a substantial disability to the individual's ability to function in society." Application for 1915(c) HCBS Waiver, Alaska, App. B–6(d). Iowa simply incorporates by reference the definition of mental retardation found in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders—Fourth Edition (DSM–IV). Application for 1915(c) HCBS Waiver, Iowa, App. B–1(b).

FN13. South Carolina is not alone. Massachusetts' application, for example, merely defines the target group as "[p]articipants age 18 and older with an intellectual disability as defined by the Massachusetts DDS who meet the ICF–MR level of care and who are determined through an assessment process to require Community Living Supports due to a moderate level of assessed need." Application for 1915(c) HCBS Waiver, Massachusetts, App. B–1(b). Virginia's application does the same thing: "Waiver services are limited to the following groups: individuals of any age with a diagnosis of intellectual disability/mental retardation...." Application for 1915(c) HCBS Waiver, Virginia, App. B–1 (b).

Section 88–210(F) of the South Carolina Code of Regulations differs from DDSN's guidelines in that it extends the developmental period to the individual's twenty-second birthday. *See* 26 S.C.Code Ann. Regs. 88–210(F) (2009). The majority accordingly posits that Regulation 88–210(F) conflicts with, and thus trumps, DDSN's guidelines as to the developmental period. However, the regulatory definition of "developmental period" by its terms applies only to the regulations in question, *see id.* § 88–210, which concern the licensing of various facilities by DDSN and not eligibility for waiver services, *see id.* § 88–105. The majority thus states correctly that the scope of this regulation is "the licensing of *all* programs" for the treatment of the mentally retarded, even if those facilities provide waiver services. However, two unitalicized words are of particular import yet side-stepped by the majority: "licensing" and "programs." Just as with statutes, we apply the plain meaning of regulations "without resort to subtle or forced construction to limit or expand the regulation's operation." *Byerly v. Connor,* 307 S.C. 441, 444, 415 S.E.2d 796, 799 (1992). Because Regulation 88–210(F) plainly applies only to the licensing of programs and not eligibility for services, it has no application in the case before us. As the majority itself recognizes, the *only* regulation concerning eligibility for waiver services provides no guidance as to what constitutes mental retardation. *See* 27 S.C.Code Ann. Regs. 126–304(A) (1976) ("Home and community based services may be provided to Medicaid eligible persons eighteen years of age ***77** or older, who have been determined by ****613** community long term care to require a skilled or intermediate level of care."). The policy guidelines at issue here clearly are not at odds with this regulation, nor do they conflict with Regulation 88–210(F) as they do not concern the licensing of programs.

In support of its conclusion that the regulation applies, the majority details the history of Regulation 88–210 and section 44–20–30 to conclude that Regulation 88–210(F) actually is an interpretation of section 44–20–30(11). When this regulation was passed, the licensing provisions were contained in Article 3 of Chapter 21, and that chapter and article were (and still are) cited as the sole authority for it. The majority then points out that these provisions were subsequently moved to Article 5 of Chapter 20 at the time the General Assembly added the undefined term "developmental period" to the definition of mental retardation found in the general provisions of Article 1 of Chapter 20. In my opinion, importing the specific licensing definition of developmental period into the general provisions solely based on this renumbering of the statutes lets the tail wag the dog, and I accordingly decline to divine any expansion of the regulation's scope. The major-

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ity therefore "resort[s] to subtle ... construction to ... expand" the regulation's operation. *See Byerly,* 307 S.C. at 444, 415 S.E.2d at 799. To borrow the majority's words, "[i]n the more than twenty years following these changes [to Title 44]," DDSN has never sought to expand the regulation beyond its plainly stated boundaries.

Even accepting as correct the majority's contention that Regulation 88–210(F) controls, the only criteria provided is that the symptoms of mental retardation must present themselves prior to age twenty-two. The open question therefore is what those symptoms must be in the absence of a comprehensive definition found in the waiver application or a regulation, namely whether the remainder of the diagnostic criteria in the guidelines apply or the SSI definition controls.

By acknowledging DDSN is free to adopt its own criteria which are more restrictive than those found in the SSI definition and narrowing its focus on the conflict between the guidelines and Regulation 88–210(F), the majority ostensibly agrees the guidelines are in effect unless they conflict with ***78** state law. However, the majority at times seems to suggest that the SSI definition has been adopted as a matter of state law and therefore is the controlling definition. In particular, the majority consistently references the SSI definition and how it "parallels," "mirrors," is "in line with", and is "consistent with" state legislative enactments. Furthermore, the majority writes that Regulation 88–210(F) "recites" the SSI definition of mental retardation and "interpret[s] [section 44–20–30(11)] in a manner consistent with" it. The majority also states that "the scope of HCBS furnished under the waiver program and recipient eligibility criteria are defined by the waiver application," and this application "reveals no intent to vary from or otherwise limit the group of individuals encompassed by the SSI definition of mental retardation." It accordingly appears the majority holds that state law incorporates the SSI definition. The conclusion which follows is that DDSN's guidelines are invalid *in toto* because they wholly conflict with this definition. To the extent this is the majority's holding, I disagree. FN14

> FN14. If the majority is not holding that the SSI definition applies, I do not understand the relevance of the many comparisons between this definition and section 44–20–30(11), Regulation 88–210(F), and the waiver application.

In my opinion, section 44–20–30(11) and Regulation 88–210(F) are not similar to the SSI definition in any substantial regard. The SSI definition for mental retardation is as follows:

> Mental retardation refers to significantly subaverage general intellectual functioning with deficits in adaptive functioning initially manifested during the developmental period; i.e., the evidence demonstrates or supports onset of impairment before age 22.
>
> The required level of severity for this disorder is met when the requirements in A, B, C, or D are satisfied.
>
> A. Mental incapacity evidenced by dependence upon others for personal needs (e.g., toileting, eating, dressing, or ****614** bathing) and inability to follow directions, such that the use of standardized measures of intellectual functioning is precluded; or
>
> ***79** B. A valid verbal, performance, or full scale IQ of 59 or less; or
>
> C. A valid verbal, performance, or full scale IQ of 60–70 and a physical or other mental impairment imposing an additional and significant work-related limitation or function; or
>
> D. A valid verbal, performance, or full scale IQ of 60–70, resulting in at least two of the following:
>
> 1. Marked restriction in activities of daily liv-

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ing; or

2. Marked difficulties in maintaining social function; or

3. Marked difficulties in maintaining concentration, persistence, or pace; or

4. Repeated episodes of decompensation, each of extended duration.

20 C.F.R. Pt. 404, Subpt. P, App. 1 § 12.05. Section 44–20–30(11) simply defines mental retardation as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period." When these two sections are juxtaposed, it is clear that the *only* mirror image between the two is in the first line of the SSI definition. In my opinion, there is nothing to suggest that the General Assembly implicitly agreed to incorporate the remaining 156 words by using language similar to the first line of the SSI definition of mental retardation.

Like section 44–20–30(11), Regulation 88–210(K) defines mental retardation in broad terms. The only difference is that subsection (F) defines developmental period as being before the individual's twenty-second birthday. While it does provide one more piece of the puzzle—and only as to the licensing of programs and not waiver eligibility—it conspicuously lacks the myriad other diagnostic criteria present in the SSI definition. I accordingly disagree that section 44–20–30(11) and Regulation 88–210(F) are similar to the SSI definition and would find no intent to adopt the SSI definition of mental retardation as a matter of state law. Because it is not the law of this State, I would stay true to the majority's central premise that states are free to set their own diagnostic ***80** criteria and find the SSI definition does not inform our analysis.

Due to the lack of controlling statutory or regulatory guidance, it was incumbent upon DDSN to set its own criteria for mental retardation. I certainly agree that such policy guidance ordinarily does not have the effect of law and can never trump a valid regulation or statute. *See* S.C.Code Ann. § 1–23–10(4) (2005). However, I do not read the majority's opinion as suggesting that such guidance must be wholly disregarded in cases where there are no controlling statutes or regulations. In this case, I do not believe there is any controlling law, and it was therefore necessary for DDSN to issue its own criteria. I would accordingly adhere to our precedents deferring to agency interpretations of statutes and hold the hearing officer did not err in applying DDSN's standard, including onset before age eighteen. *See Byerly Hosp. v. S.C. State Health & Human Servs. Fin. Comm'n*, 319 S.C. 225, 229, 460 S.E.2d 383, 386 (1995) ("[B]ecause the Commission has been designated as the single state agency for implantation of Medicaid, great deference must be accorded its interpretations of Medicaid laws and regulations.").

II.

Because I believe the hearing officer did not commit an error of law in applying DDSN's definition of mental retardation, I proceed to reach the other issues raised on appeal by Doe.

A. Evidence of Mental Retardation

Turning to facts of this case, Doe's scores place her right on the border of mental retardation under DDSN's definition. Between the ages of twelve and seventeen, her full scale IQ scores ranged from a low of sixty-eight—which was felt to be an underestimate of her abilities—to a high of seventy-three. Additionally, the only adaptive behavior score obtained before her eighteenth birthday***615** was a seventy. At this point, it is left to the professional judgment of those reviewing Doe's application to determine whether she is mentally retarded under DDSN's standards. While the record contains diagnoses made by various individuals, including physicians who treated Doe, that she was mentally retarded before she turned eighteen, the record also contains testimony of DDSN officials expressing concern about the bald nature of some of these dia-

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gnoses and evidence that Doe's levels of functioning may ***81** have been higher than meets the eye. Additionally, the record contains findings that she is in the borderline range of intelligence, which is not equivalent to mental retardation. The record contains similarly conflicting evidence of the impact her intellectual deficits have on her adaptive skills.

Viewing the record in its entirety, I cannot say the ALC erred in affirming the hearing officer. I believe there is substantial evidence to support the conclusion that Doe does not suffer from mental retardation. Indeed, there may be substantial evidence to support the opposite conclusion as well. But, the fact that reasonable minds may reach an opposite result based on the same evidence does not render the hearing officer's order invalid. *Waters v. S.C. Land Res. Conservation Comm'n,* 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996) (stating the fact that one could draw inconsistent conclusions from the same body of evidence does not render the agency's decision unsupported by substantial evidence). The parties here presented voluminous evidence of Doe's condition, each side fleshing out its position amply. In the end, this case boiled down to a quintessential factual determination and battle of the experts. Under our standard of review, I would find no error in the hearing officer's decision.[FN15]

FN15. At various points, Doe also argues that DDSN and HHS should be estopped from denying she suffers from mental retardation because they sought reimbursement from the federal government for services they supplied using the diagnostic code for mental retardation. However, it appears Doe did not learn of this fact until discovery. To the extent such an act could give rise to estoppel against the government, Doe's argument must fail because she cannot prove any reliance on this billing practice. *See Grant v. City of Folly Beach,* 346 S.C. 74, 80, 551 S.E.2d 229, 232 (2001).

Doe next argues the hearing officer and the ALC erred in not giving controlling weight to the diagnoses of mental retardation made by her treating physicians. She bases her argument on 20 C.F.R. § 404.1527(d)(2), which provides, "If [the SSA] find[s] that a treating source's opinion on the issue(s) of the nature and severity of [the] impairment(s) is well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in [the] case record, [the SSA] will give it controlling weight." Without discussing whether DDSN had sufficient reason to not give controlling weight to these diagnoses,***82** the language in this regulation by its very terms applies only to SSA determinations of disability. No party here disputes that Doe is disabled. Instead, we are faced with a state agency determination of whether Doe is eligible for ICF/MR waiver services. I can find no statutes or regulations, and Doe has not directed us to any, which require a state agency in DDSN's position to give controlling weight to a treating physician's diagnosis.

This is not to say, however, that a treating physician's diagnosis is not entitled to any weight. To the contrary, DDSN and the hearing officer ought to examine and consider the opinions of those doctors as relevant, probative evidence of an applicant's condition. Under the facts of a particular case, DDSN and the hearing officer may attach any such weight to these diagnoses as they see appropriate and the facts permit. While the policy behind 20 C.F.R. § 404.1527(d)(2) is a good one, there is no similar requirement under our regulations, and this Court is not in a position to create one. Instead, the diagnoses should be considered along with the whole body of evidence in the record. On appeal, the ALC and the appellate courts also should consider them in light of all the other evidence in determining whether DDSN's decision is supported by substantial evidence, or is arbitrary or capricious.[FN16]

FN16. For example, if a treating physi-

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cian's diagnosis has not been called into question or there are no competing diagnoses, not giving it controlling weight may be arbitrary and an abuse of discretion. That situation is not present in the case before us.

****616** In a similar vein, Doe also argues the hearing officer restricted the rights of her treating physicians to practice medicine by not giving controlling weight to their diagnoses. Every state seeking to offer waiver services must provide in the application "[a] description of who will make these evaluations and how they will be made." 42 C.F.R. § 441.303(c)(1). South Carolina's approved program specifically permits non-physicians to determine whether an applicant suffers from mental retardation.[FN17] South Carolina Waiver, App. B–6(c). In this case, DDSN and the hearing officer disagreed with the ***83** diagnoses made by Doe's treating physicians. As discussed, while the fact that some doctors did diagnose her as being mentally retarded certainly is relevant evidence, it is just evidence. Simply because DDSN officials and the hearing officer in a regulatory action disagreed with the diagnoses of Doe's treating physicians in no way limits their ability to practice medicine. Not only did these officials have the authority to determine eligibility for MR/RD waiver services, it would be absurd to hold that a disagreement with a physician infringes on that doctor's ability to practice medicine in any way.

FN17. The waiver application in effect at the time permitted physicians to make an eligibility determination. Based on this, Doe argues that because her treating physicians found her to be mentally retarded, their diagnoses control. However, this argument assumes that her treating physicians were actually "performing initial evaluations of level of care for waiver participants." Nothing in the record indicates that they were performing such a function here.

Doe finally argues the hearing officer erred in considering evidence outside of the record. In particular, Doe argues the hearing officer concluded the SSA awarded SSI benefits for an unidentified condition other than mental retardation based on his own experiences as an SSA disability examiner and disability hearing officer. However, I believe Doe's argument is not preserved for review as she has raised it for the first time before this Court. Doe accordingly argues that because she is an incompetent, we should relax our preservation rules. *See Galloway v. Galloway,* 249 S.C. 157, 160, 153 S.E.2d 326, 327 (1967). It is within our discretion to relax the preservation requirement when the rights of a minor or incompetent are concerned. *Ex parte Morris,* 367 S.C. 56, 65, 624 S.E.2d 649, 654 (2006). I would decline to do so in this case because Doe was at all times well-represented by counsel. *Cf. Cumbie v. Cumbie,* 245 S.C. 107, 113, 139 S.E.2d 477, 480 (1964) (reaching unpreserved issue because "[i]t is quite apparent here that the guardian ad litem for the incompetent and the minor defendants treated the appointment as a pure formality, and, as far as the record goes, made no effort whatever to protect the interests of either the incompetent or said minors").

B. Related Disability

Doe argues she has two related disabilities, cerebral palsy and epilepsy. At no point did DDSN ever question whether she suffers from either of those conditions. Instead, the relevant discussion was the *extent* of those conditions, including***84** whether they both had the requisite effect on Doe's adaptive skills and, in particular, whether her epilepsy was as severe as she contended it was. While the witnesses in this case did observe and document her seizures, there was no SSA diagnosis of epilepsy as there was for cerebral palsy.[FN18] Accordingly, she first argues the hearing officer erred in not following the procedures outlined in 42 C.F.R. § 435.541 when evaluating her seizures. *See* 42 C.F.R. § 435.541(c)(4)(i) ("The [state] agency must make a determination of disability in accordance with the requirements of this section if any of

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the following circumstances exist: ... The individual applies for Medicaid as a non-cash recipient ... and ... [a]lleges a disabling condition different from, or in addition to, **617 that considered by SSA in making its determination....'). However, this requirement only applies when a state agency instead of the SSA is making a *disability* determination instead of the SSA, which only occurs in specific situations not applicable here. *See* Medicaid Program; Eligibility Determinations Based on Disability, 54 Fed.Reg. 50,755 (Dec. 11, 1989). Doe is not asking DDSN to determine whether she is disabled by her epilepsy; she is asking DDSN to determine whether this condition is a related disability for purposes of receiving HCBS. Because these are two different determinations, I do not believe the hearing officer erred in not following 42 C.F.R. § 435.541 with respect to Doe's epilepsy.

FN18. The doctor performing the SSI examination concluded "[s]he has multiple physical, mental, and emotional impairments, including cerebral palsy with left spastic hemiparesis and Mild Mental Retardation." Based on this assessment, which included a fairly thorough review of Doe's condition, the SSA awarded her SSI with a primary diagnosis of mental retardation and a secondary diagnosis of cerebral palsy.

She next argues that the hearing officer erred in applying the definition of related disability found in section 44–20–30(15) [FN19] as opposed to the Medicaid [FN20] definition. Although I believe the hearing officer did not err in applying the definition from section 44–20–30(15), any error involved would be *85 harmless. Both definitions contain the same requirement for limitation in three of six major life areas, and as I conclude below, the hearing officer's findings that Doe's conditions are not so limiting is supported by substantial evidence. Doe also argues the hearing officer in any event erred in his application of the definition of related disability found in section 44–20–30(15). I agree with Doe that the hearing officer erred in his interpretation, but I would find this error harmless as well for the same reason.

FN19. Section 44–20–30(15) provides,

> "Related disability" is a severe, chronic condition found to be closely related to mental retardation or to require treatment similar to that required for persons with mental retardation and must meet the following conditions:
>
> (a) It is attributable to cerebral palsy, epilepsy, autism, or any other condition other than mental illness found to be closely related to mental retardation because this condition results in impairment of general intellectual functioning or adaptive behavior similar to that of persons with mental retardation and requires treatment or services similar to those required for these persons.
>
> (b) It is manifested before twenty-two years of age.
>
> (c) It is likely to continue indefinitely.
>
> (d) It results in substantial functional limitations in three or more of the following areas of major life activity: self-care, understanding and use of language, learning, mobility, self-direction, and capacity for independent living.
>
> DDSN has offered no additional guidance with respect to related disabilities.

FN20. The regulatory definition reads in part,

> Persons with related conditions means individuals who have a severe, chronic disability that meets all of the following conditions:

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> (a) It is attributable to—
>
> (1) Cerebral palsy or epilepsy; or
>
> (2) Any other condition, other than mental illness, found to be closely related to mental retardation because this condition results in impairment of general intellectual functioning or adaptive behavior similar to that of mentally retarded persons, and requires treatment or services to those required for these persons.
>
> 42 C.F.R. § 435.1010.

The record establishes that Doe's adaptive behavior scores were within the range for mental retardation, and therefore within the range for a related disability. Additionally, the evidence shows that her limitations arose prior to her twenty-second birthday and are likely to continue indefinitely. However, I believe there is substantial evidence to support the conclusion that Doe has not met the requirement of experiencing "substantial limitations" in three of the six major life areas listed in the statute.

The hearing officer described her limitations as follows:

> ***86** [Doe] walks with a mild limp, with an awkward gait and she has some difficulty with balance secondary to her left hemiparesis. [Doe] has weakness in her left arm with some contracture in her left hand. She can only use her left hand as an assist/stabilizer for small objects and she has difficulty using zippers, and buttoning small buttons. [Doe] is independent with dressing , bathing, toileting, eating, transferring from one surface to another and ambulation; however, she may require some prompting to perform some of these activities at times.

In his final order, the hearing officer made a series of specific findings leading to the conclusion that Doe does not have a substantial ****618** limitation in any of the six major life areas listed in the statute. In sum, he found,

> [Doe's] Cerebral Palsy and Epileptic Seizure Disorder do not prevent [Doe] from performing all self-care activities with little or no assistance or supervision. Her Cerebral Palsy and Epileptic Seizure Disorder do not affect her understanding and use of language or learning; however, [Doe's] longstanding mental disorders and learning disorder and/or borderline intellectual function do affect these areas. She is able to be independently mobile despite her physical handicaps. [Doe's] Cerebral Palsy and Epileptic Seizure Disorder do not limit [Doe's] capacity for independent living; however, her longstanding mental disorders are the biggest obstacle to this area of major life activity. [Doe's] Cerebral Palsy and Epileptic Seizure Disorder do not result in substantial functional limitations in self-care, understanding and use of language, learning, mobility, self-direction or capacity for independent living; therefore, she does not have a Related Disability.

As the ALC recognized, Doe has submitted voluminous evidence to support her position that she does indeed suffer from a related disability. Numerous witnesses recounted the limitations Doe's conditions place on her daily life, and no one before the Court contends that Doe can lead a truly normal life. DDSN, on the other hand, introduced equally voluminous evidence to demonstrate that her limitations may not be as severe as they appear and are perhaps the product of her intentional efforts to not integrate herself into the community. In the end, the hearing officer found that any limitations Doe ***87** does have generally result from mental illness and disorders, not cerebral palsy and epilepsy.[FN21] Once again, we are faced with an extremely close factual determination. But, also once again, it is not the province of an appellate court to weigh the evidence before it on appeals from administrative proceedings. Based on our standard of review, I believe there is substantial evidence to support the finding that Doe does not have substantial limitations in any of the major life areas and accordingly does not suffer from a related disability. Addition-

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ally, I can discern no evidence that this finding by the hearing officer was arbitrary, capricious, or an abuse of discretion. Rather, it appears to be a well-reasoned decision following a thorough review of the evidence presented.

> FN21. Doe again argues the hearing officer failed in not giving controlling weight to the conclusions of the physicians who treated Doe's seizures and cerebral palsy. As I concluded *supra,* failure to do so is not legal error.

C. Due Process Claims

Doe finally argues the hearing officer violated her constitutional due process rights in three ways: (1) basing his decision on reasons other than those contained in the notice provided by DDSN to Doe; (2) determining Doe failed to exhaust her administrative remedies; and (3) permitting DDSN to engage in retaliatory conduct. I disagree.

As to her first argument, a state cannot withdraw Medicaid benefits without providing notice and an opportunity to heard. *O'Bannon v. Town Court Nursing Ctr.,* 447 U.S. 773, 786–87, 100 S.Ct. 2467, 65 L.Ed.2d 506 (1980). In order to meet the requirements of procedural due process, the State must provide adequate notice, adequate opportunity to be heard, the right to introduce evidence, and the right to confront and cross-examine witnesses. *In re Vora,* 354 S.C. 590, 595, 582 S.E.2d 413, 416 (2003).

Initially, I do not believe Doe's notice arguments are preserved for review. Nowhere in the record does it appear she raised this issue to the hearing officer or the ALC. Indeed, Doe concedes as much by preemptively arguing in her initial brief that we should relax our preservation rules because she is an incompetent. As discussed previously, I would decline to ***88** do so under the facts of this case. Furthermore, I question the merits of her argument. Doe claims the hearing officer engaged "[i]n a classic case of trial by ambush" when he considered the results of evaluations performed by school psychologists offered by DDSN from her high school years. However, Doe's argument ignores the fact that she had three months from the close of DDSN's case-in-****619** chief to prepare her own case.[FN22] It would therefore appear she had ample notice and opportunity to respond to this alleged ambush.

> FN22. Although Doe was the party who brought the case before the hearing officer, DDSN presented its evidence first January 24–26, 2006, and Doe presented her case April 27–28, 2006.

Second, Doe contends the ALC erred in finding she has not exhausted her remedies with respect to her argument that DDSN did not provide her with free choice of facilities for treatment. This issue is now moot in light of the decision of the United States Court of Appeals for the Fourth Circuit that her freedom of choice claim fails as a matter of law. *See Doe v. Kidd,* 501 F.3d 348, 358–60 (4th Cir.2007) (*Doe I*).

Finally, Doe argues the final DDSN evaluation, the one which led to the termination of her benefits, was in retaliation for a separate civil rights lawsuit she filed in federal court.[FN23] In her brief to this Court, Doe engages in a lengthy discussion of the record but cites no law to support her contentions. She then argues due process entitles her to notice and an opportunity to respond to the final 2005 evaluation, again citing no law and making only passing references to the Fourteenth Amendment and the Medicaid Act. The essence of her arguments, however, is more of an attack on the credibility of DDSN's final decision, not that DDSN engaged in retaliatory conduct. ***89** Because I have already resolved that issue, I find no error in rejecting this claim.

> FN23. Doe filed a lawsuit alleging violations of the Medicaid Act, Americans with Disabilities Act, and various state laws against DDSN, HHS, and certain state officials. *Doe I,* 501 F.3d at 352. *Doe I* dis-

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posed of Doe's claim regarding her freedom of choice of providers. *Id.* at 358–60. The Fourth Circuit subsequently disposed of her remaining argument that DDSN violated her civil rights by not providing her residential services with reasonable promptness. *Doe v. Kidd,* 419 Fed.Appx. 411, 415–17 (4th Cir.2011) (Doe II). *Doe II* has no impact on our decision in this case as the Fourth Circuit specifically left open the issues regarding Doe's eligibility and retaliation claims for us to consider. *Id.* at 420–21.

III.

The case before us is the culmination of a long and contentious dispute regarding one young woman's eligibility for certain Medicaid benefits. Throughout this process, tensions have flared as the parties have engaged in a vigorous dispute over some very complicated and emotionally-charged issues. At the center of all of this is a now twenty-eight-year-old woman with undeniable cognitive and adaptive deficits. After a review of the regulations concerning the labyrinthine Social Security and Medicaid Acts, I agree there is no rule requiring states to be bound by the federal government's disability determination or the SSI definition of mental retardation. I believe there is an express policy of granting states wide latitude in designing and implementing programs to best meet their needs and the needs of the target population. Where I part company with the majority, however, is with respect to whether South Carolina has adopted a different definition of mental retardation. In my opinion, DDSN acted within its authority in adopting its present definition and would apply it in this case.

As to Doe's remaining arguments, based on our standard of review, I would find the hearing officer's determination that Doe does not suffer from mental retardation or a related disability is supported by substantial evidence. In administrative appeals, this Court does not make findings of fact or weigh evidence; we sit only to ensure that the findings below are supported by substantial evidence and are not arbitrary, capricious, or an abuse of discretion. As discussed, both parties presented copious evidence of the nature and extent of Doe's conditions. Accordingly, it was the job of the hearing officer to make this incredibly close factual call. Simply because reasonable minds may disagree with the result does not make it unsupported by substantial evidence or arbitrary or capricious. I also believe the hearing officer did not commit any errors of law. Therefore, I would affirm the order of the ALC.

PLEICONES, J., concurs.

S.C.,2011.
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ATTACHMENT D

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Barbara Hickey, Appellant, vs. South Carolina Department of Health and Human Services, Respondent.	Docket No. 10-ALJ-08-0656-AP **FINAL ORDER AND DECISION**

STATEMENT OF THE CASE

This matter is before me pursuant to the appeal of Barbara Hickey (Appellant), from a final decision of the Respondent, South Carolina Department of Health and Human Services (DHHS or Department). This appeal is made in response to Respondent's January 1, 2010 cut in Personal Care Aide (PCA II) services to all those persons who, like the Appellant, rely on these services to live in the community and avoid institutionalization, and to Respondent's denial of Appellant's right to contest this withdrawal of necessary services at a hearing.

On December 1, 2009, Appellant received a letter from Respondent, stating that her in-home PCA II hours had been cut from 50 per week to 28 per week. Petitioner appealed that decision on January 15, 2010. Department of Disability and Special Needs (DDSN) responded to her appeal stating that the "limits cannot be exceeded and must be applied to all [Mental Retardation/Related Disabilities (MR/RD)] Waiver participants." Appellant appealed that decision on January 25, 2010. The hearing officer issued an "interlocutory order" dated January 29, 2010 which stated that she believed that the DHHS had the authority to administer the Medicaid Program in South Carolina, and that the Center for Medicare and Medicaid Services (CMS) had approved the revised Waiver, including the service caps. Petitioner responded on February 12, 2010 stating that she did not understand the decision and requesting a hearing. On

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February 17, 2010 the hearing officer dismissed appellant's case stating that she failed to respond to his Interlocutory Order with an allegation of error in fact or in law as ordered. On March 1, 2010, counsel for Appellant filed a Motion to Alter or Amend Judgment and a supporting Affidavit in response to the decision to dismiss Appellant's case and requested a fair hearing be held. On March 10, 2010, DHHS filed a Reply to Appellant's Motion requesting the hearing officer uphold its dismissal of Appellant's case and deny her a hearing. The hearing officer issued a final decision on July 20, 2010 dismissing Appellant's case without a hearing. Appellant received the final decision on July 28, 2010 and appealed to this Court on August 27, 2010. Both parties were represented by counsel at Oral Arguments on April 12, 2011 at the offices of the ALC in Columbia, South Carolina.

Issues on Appeal

1. Has the Department treated its PCA II benefit cap as a binding norm such that promulgation as a regulation is necessary for it to be enforceable?
2. Does inclusion in the waiver document make the PCA II cap enforceable without promulgation?
3. Does S.C. Code § 44-6-90 exempt the Department from promulgating regulations to carry out its duties?
4. Did the Department err in refusing to provide Hickey with a hearing?
5. Did the Department's decision contain erroneous findings of fact?

Standard of Review—

This matter is before the ALC in its appellate jurisdiction pursuant to S.C. Code Ann. § 1-23-600(D) (Supp. 2010). Accordingly, the Administrative Procedures Act's standard of review governs this appeal. See S.C. Code Ann. §§ 1-23-600(E), 1-23-380 (Supp. 2010); see also Byerly Hosp. v. S.C. State Health & Human Servs. Fin. Comm'n, 319 S.C. 225, 229, 460 S.E.2d 383, 385 (1995). The standard used by appellate bodies, including the ALC, to review agency decisions is provided by S.C. Code Ann. § 1-23-380(5) (Supp. 2010). This section provides:

> The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of

the agency or remand the case for further proceedings. The court may reverse or modify the decision [of the agency] if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

(a) in violation of constitutional or statutory provisions;
(b) in excess of the statutory authority of the agency;
(c) made upon unlawful procedure;
(d) affected by other error of law;
(e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
(f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-380(5) (Supp. 2010).

A decision is supported by "substantial evidence" when the record as a whole allows reasonable minds to reach the same conclusion reached by the agency. Bilton v. Best Western Royal Motor Lodge, 282 S.C. 634, 321 S.E.2d 63 (Ct. App. 1984). Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence that, considering the record as a whole, would allow reasonable minds to reach the conclusion the agency reached in order to justify its action. Hargrove v. Titan Textile Co., 360 S.C. 276, 289, 599 S.E.2d 604, 611 (Ct. App. 2004). The fact that the record, when considered as a whole, presents the possibility of drawing two inconsistent conclusions from the evidence does not prevent the agency's finding from being supported by substantial evidence. Id.; Waters v. S.C. Land Res. Conservation Comm'n, 321 S.C. 219, 467 S.E.2d 913 (1996); Grant v. S.C. Coastal Council, 319 S.C. 348, 461 S.E.2d 388 (1995). However, § 1-23-380(5) requires the reviewing tribunal to consider not only the amount of evidence, but also the quality of that evidence; it must be both "reliable" and "probative," as well as "substantial." See S.C. Code Ann. § 1-23-380(5) (Supp. 2010).

An abuse of discretion occurs when a decision is based upon an error of law, such as application of the wrong legal principle; or, when based upon factual conclusions, the ruling is without evidentiary support; or when the judge is vested with discretion, but the ruling reveals no discretion was exercised; or when the ruling does not fall within the range of permissible decisions applicable in a particular case. Ex Parte Capital U-Drive-It, Inc., 369 S.C. 1, 5, 630 S.E.2d 464, 467 (2006). A decision is arbitrary or capricious when no rational basis for the conclusion exists, when it is based on one's will and not upon any course of reasoning and

exercise of judgment. Converse Power Corp. v. S.C. Dep't of Health & Envtl. Control, 350 S.C. 39, 564 S.E.2d 341 (Ct. App. 2002); Deese v. S.C. State Bd. of Dentistry, 286 S.C. 182, 184-85, 332 S.E.2d 539, 541 (Ct. App. 1985). A decision may be arbitrary or capricious when it is made at one's pleasure without adequate determining principles, or is governed by no fixed rules or principles. Deese, 286 S.C. at 184-85, 332 S.E.2d at 341. Non-uniform, inconsistent, or selective application of authority can indicate arbitrariness. See Mungo v. Smith, 289 S.C. 560, 571, 347 S.E.2d 514, 521 (Ct. App. 1986).

Medicaid MR/RD Waiver Program

Medicaid is an optional state program created under Title XIX of the Social Security Act. It enables states to receive federal financial assistance specifically for the medical care of needy individuals. See 42 U.S.C.A. § 1396; Wilder v. Va. Hosp. Ass'n, 496 U.S. 498, 502 (1990); Doe v. Kidd, 501 F.3d 348, 351 (4th Cir. 2007). States are not required to participate in Medicaid; however, if they choose to do so, they must comply with all federal Medicaid laws and regulations. Wilder, 496 U.S. 498; Doe, 501 F.3d at 351; see also Antrican v. Odom, 290 F.3d 178 (4th Cir. 2002) ("Although North Carolina may retain a special sovereignty interest in choosing whether to participate in the Medicaid program, once it elects to participate, it is not entitled to assert that interest to insulate itself from the requirements of the federal program."), cert. denied, Odom v. Antrican, 537 U.S. 973 (2002). As a prerequisite to receiving federal assistance, a state must submit a detailed plan, referred to as the "State Plan," to the CMS for approval. 42 U.S.C.A. § 1396a.

In South Carolina, DHHS is the state agency responsible for administering and supervising the state's Medicaid programs. S.C. Code Ann. § 44-6-30(1); Doe, 501 F.3d at 351. DDSN is responsible for the state's treatment and training programs for people with mental retardation and related disabilities. Doe, 501 F.3d at 351. Accordingly, in some instances, such as the case at hand, DDSN can act as an agent for DHHS. Id.

Medicaid normally provides funding for individuals with mental disabilities who live in an institution. However, states may make a request to the CMS for a "waiver" to pay for otherwise non-covered Home and Community Based Services (HCBS) for Medicaid-eligible persons who might otherwise be institutionalized as long as the services are cost effective. 42 U.S.C.A. § 1396n(c).

States must seek approval for these waiver programs from the CMS. If a waiver is approved, the CMS waives compliance with state program requirements while permitting states to remain eligible for reimbursement with federal grants. Id. The waiver program provides Medicaid reimbursement to participant states for providing HCBS to individuals who would otherwise require institutional care. See 42 U.S.C.A. § 1396n(c). Waivers are approved for a period of two to three years and may be renewed thereafter. Under a program operated by DDSN, CMS has waived the requirement that an individual live in an institution to receive services. In this appeal, the waiver program at issue is the MR/RD Waiver Program. The MR/RD Waiver Program permits a recipient to receive services at home or in the community, rather than in an Intermediate Care Facility Mental Retardation (ICF/MR) such as a nursing home. Doe, 501 F.3d at 351.

On January 1, 2010 a new MR/RD waiver renewal became effective following approval by CMS. The renewed waiver document includes a cap of 28 hours per week for PCA II services. PCA II services consist of hands-on personal care to help a participant accomplish the activities of daily living such as bathing, toileting, dressing and eating.

I. Has the Department treated its PCA II benefit cap as a binding norm such that promulgation as a regulation is necessary for it to be enforceable?

The central issue raised by the Appellant in this case is whether the Department is entitled to rely on an amendment to the MR/RD waiver document to cut Appellant's PCA II services from 50 to 28 hours per week. It is uncontroverted that the cap on PCA II services was not promulgated as a regulation under the Administrative Procedures Act, S.C. Code Title 1, Chapter 23 (APA). The Department makes three arguments in support of its position that it properly applied the cap on PCA II services in this case without promulgating the cap provision as a regulation.

The Department first asserts that the cap on CPA II services is not a rule that must be promulgated as a regulation in order to be enforceable. "[W]hether an agency's action or statement amounts to a rule--which must be formally enacted as a regulation -- or a general policy statement -- which does not have to be enacted as a regulation -- depends on whether the action or statement establishes a 'binding norm.'" Sloan v. S.C. Bd. of Physical Therapy Exam'rs, 370 S.C. 452, 636 S.E.2d 598 (2006). In order for an agency to create a "binding" rule

it must be promulgated as a regulation. Home Health Serv., Inc. v. S.C. Tax Comm'n, 312 S.C. 328, 440 S.E.2d 375 (1994). The key factor in determining whether a policy statement establishes a "binding norm" is the extent to which the challenged policy leaves the agency free to exercise its discretion to follow or not follow the policy at issue in a particular situation. Home Health Serv. Inc. v. S.C. Tax Comm'n, 312 S.C. 324, 328, 440 S.E.2d 375, 378 (1994). If the policy at issue "so fills out the statutory scheme" that the agency will only look to whether the policy's criteria are met in taking action or rendering a decision, the policy will be considered a "rule" or "regulation." Id. As long as the agency remains free to consider the individual facts in taking action or rendering a decision, the policy at issue will not be considered a "binding norm." Id. Thus, to determine whether a policy or guideline establishes a "binding norm," courts look to the actions of the agency, not to the labels given by the agency.

In this case, the Department argues that it has not treated the cap on PCA II services as a binding norm. I find no support for this argument in the record; the Department has consistently treated the PCA II services cap as a binding norm. In its initial letter denying Hickey's request for continued PCA II services benefits at the level she formerly received, the Department stated,

> [L]imits or caps were placed on services in the MR/RD Waiver. Approval for these limits or caps was obtained from the [CMS]. These approved limits cannot be exceeded and must be applied to all MR/RD Waiver participants. While we understand and appreciate the hardship these changes may place on you, we are not at liberty to exceed the established limits.

In response to Hickey's appeal of that decision, the hearing officer upheld the Department's decision denying Hickey a hearing in part because, the Department

> need not grant a hearing if the sole issue is a Federal or State law requiring an automatic change adversely affecting some or all recipients. The reduction in Petitioner's PC II hours was imposed by caps and limits on these, and other services specified in the MR/RD Waiver as renewed effective January 1, 2010, and imposed upon all Waiver participants. These changes in the Waiver were approved in advance by ...CMS....For the purposes of this decision, it is presumed that this approval, inclusive specifically of the changes approved, by CMS carries the force and effect of law.

Thus, because the Department's decisions in this case look only to whether the services Hickey received were within the cap and not to any other standard or factual issues, the cap on PCA II services was treated as a binding norm and not as a general policy statement. The Department did not treat the cap as a policy statement that it was free to exercise its discretion to

follow or not follow according to the particular facts in Hickey's situation. See Ryder, 717 F.2d at 1377-1378.

II. Does inclusion in the waiver document make the PCA II cap enforceable without promulgation?

The Department next argues that it is not required to promulgate the provisions of the waiver document in order to enforce them because they are a contract between the state and federal government contemplated by the agency statutes and regulations and are entitled to deference as a "federal directive."[1] The Department cites its regulation S.C. Code Ann. Regs. 126-300 and its general grants of authority contained in S.C. Code Ann. § 44-6-30 to 40 in arguing that the PCA II service cap should be enforced.

I find no legal support for this argument. On the contrary, other states which have considered this precise question have held that the provisions of a waiver document must be promulgated as regulations under the state's APA in order to be enforceable as a rule or binding norm. In McCrann v. N.C. Dept. Health and Human Services, 704 S.E.2d 899 (N.C. App. 2011), the North Carolina Court of Appeals held that it was error of law for the agency to rely upon the provisions of a waiver to deny services to a Medicare beneficiary. The court held that the provisions of the waiver limiting benefits were "rules" that must be promulgated as regulations pursuant to the state APA in order to carry the force of law. Likewise, in Hoban v. State of Vermont, Op. No. 200-4-05, Lexis 40 (Vt. Super 2005). the Superior Court of Vermont held that a cap on HCBS contained in a Medicaid waiver program was void due to the agency's failure to promulgate the cap as a regulation under the state APA. See also, Mullins v. N. Dakota Dept. of Human Services, 454 N.W.2d 732 (N.D. 1990) (invalidating unpromulgated manual provisions purporting to define individuals eligible for benefits). Compare, Rennich ex rel. Rennich v. N. Dakota Dept. of Human Services, 2008 ND 171, 756 N.W.2d 182, 188 (N.D. 2008) (distinguishing situation where conditions of eligibility are set by federal statute and regulation).

III. Does S.C. Code § 44-6-90 exempt the Department from promulgating regulations to carry out its duties?

[1] For purposes of this discussion I assume without deciding that the Department's characterization of the waiver document as a "federal directive" is accurate. It appears that the waiver document was authored by the Department and approved by the federal agency, CMS.

Lastly, the Department asserts that South Carolina statutes do not require the Department to promulgate regulations to carry out its duties. In support of this position the Department cites S.C. Code Ann. § 44-6-90, which states, "The department may promulgate regulations to carry out its duties." The Department's argument is that because § 44-6-90 allows, but does not require, the Department to promulgate regulations, that the Department is exempt from the requirements of the APA when carrying out its duties. In South Carolina the cardinal rule of statutory interpretation requires the trier of fact to ascertain the intent of the legislature. State v. Scott, 351 SC 584, 588, 571 S.E.2d 700, 702 (2002). In doing so, the court must give a reasonable and practical construction to the statute that is consistent with the purpose and policy expressed in the statute. Davis v. NationsCredit Fin. Servs. Corp., 326 SC 83, 484 S.E.2d 471 (1997). Where there is one statute addressing an issue in general terms and another statute dealing with the issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect. Capco of Summerville, Inc. v. Gayle Construction Company, Inc., 368 S.C. 137, 628 S.E.2d 38 (2006). Statutes in apparent conflict should, if reasonably possible, be construed so as to allow both to stand and to give effect to each. Higgins v. State, 307 S.C. 446, 449, 415 S.E.2d 799, 801 (1992). I conclude that the general language allowing the Department to promulgate regulations does not override the more specific requirements of the APA. To interpret Section 44-6-90 as urged by the Department would imply that every agency given general authority to promulgate regulations is thereby exempted from the requirements of the APA. Such an interpretation does not yield a reasonable and practical construction consistent with the purpose and policy expressed in either the APA or § 44-6-90. Therefore, the Department erred in treating the cap on PCA II services as a binding and enforceable rule without promulgating the cap as a regulation pursuant to the APA.

IV. Did the Department err in refusing to provide Hickey with a hearing?

The procedures for appealing a decision regarding Medicaid services provided under a HCBS waiver are set forth in the Code of Federal Regulations. See 42 C.F.R. §§ 441.200 *et. seq.* Those regulations provide that a state hearing system for Medicaid recipients under a state waiver "must meet the due process standards set forth in Goldberg v. Kelly, 397 U.S. 254 (1970)." 42 C.F.R. § 431.205(d). The state agency must grant an opportunity for a hearing to any applicant who requests it because his claim for services is denied, 42 C.F.R. § 431.220(a)(1),

or if the state agency takes action to suspend, terminate or reduce services. 42 C.F.R. § 431.200(b). However, the agency need not grant a hearing if the sole issue is a federal or state law requiring an automatic change adversely affecting some or all recipients. 42 C.F.R. § 431.220(b). As a state agency administering the Medicaid program, the Department must comply with all federal Medicaid laws and regulations. Wilder v. Va. Hosp. Ass'n, 496 U.S. 498, 502 (1990); Doe v. Kidd, 501 F.3d 348, 351 (4th Cir. 2007).

The Department advances two arguments in support of its dismissal of Hickey's matter without a hearing. First, the Department argues that the reduction of benefits carried out pursuant to the revised waiver's cap on PCA II services is an issue involving a change in state or federal law and so no hearing is required pursuant to 42 C.F.R. § 431.220(b) (stating that the agency need not grant a hearing if the sole issue is a federal or state law requiring an automatic change adversely affecting some or all recipients). I am unpersuaded by this argument because, as discussed in detail above, the PCA II cap contained in the revised waiver document does not have the force and effect of law. Thus, Hickey's request for a hearing does not fall within the exception to the hearing requirement provided by 42 C.F.R. § 431.220(b).

Second, the Department argues that the process afforded Hickey met the requirements of Due Process and the federal regulations because the Department offered Hickey an opportunity to present written argument in response to the interlocutory order. The Department argues that because Hickey responded to the interlocutory order by requesting a hearing rather than by submitting written statements demonstrating a "valid factual dispute" that she failed to avail herself of the opportunity the Department offered for a hearing. The Department cites Rosen v. Goetz, 410 F.3d 191 (6th Cir. 2005) in support of its argument that only an opportunity for a written argument is minimally required in some cases. Because the Rosen case arose in the context of a challenge of a procedure by hundreds of plaintiffs concerned with the enforcement of a consent order and not in the context of an individual request for a hearing preceeding a reduction in Medicaid benefits, I find the reasoning contained therein insufficient to overcome the hearing requirements applicable to this case pursuant to the controlling federal regulations and the standard enunciated by the Supreme Court in Goldberg. The Goldberg Court held:

> The city's procedures presently do not permit recipients to appear personally with or without counsel before the official who finally determines continued eligibility. Thus a recipient is not permitted to present evidence to that official orally, or to

> confront or cross-examine adverse witnesses. These omissions are fatal to the constitutional adequacy of the procedures. The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard. It is not enough that a welfare recipient may present his position to the decision maker in writing or second-hand through his caseworker. Written submissions are an unrealistic option for most recipients, who lack the educational attainment necessary to write effectively and who cannot obtain professional assistance. Moreover, written submissions do not afford the flexibility of oral presentations; they do not permit the recipient to mold his argument to the issues the decision maker appears to regard as important....Therefore a recipient must be allowed to state his position orally.

Goldberg v. Kelly, 397 U.S. 254, 268- 269, 90 S. Ct. 1011, 1021, 25 L. Ed.2d 287 (1970). The controlling federal regulations specifically require the Department to "meet the due process standards set forth in Goldberg." 42 C.F.R. § 431.205(d). Moreover, federal regulations require the Department to grant an opportunity for a hearing to any applicant who requests it because his claim for services is denied, 42 C.F.R. § 431.220(a)(1), or if the state agency takes action to suspend, terminate or reduce services. 42 C.F.R. § 431.200(b). Because the Department seeks to reduce Hickey's benefits and she requested a hearing, it was error for the Department to deny her a hearing. It was not enough to demand that she present issues of fact in writing and to dismiss her appeal when she requested an in-person hearing. Moreover, where a case involves important questions of novel impression, such as the issues presented here concerning the enforceability of the unpromulgated waiver document and the issues of compliance with the Americans with Disabilities Act currently pending in federal district court,[2] it is error to dismiss the case for failure to state a claim. Evans v. State Retirement, 344 S.C. 60 543 S.E.2ed 547 (2001).

V. Did the Department's decision contain erroneous findings of fact?

Appellant raises several additional issues concerning whether findings of fact and recitations of the history of the proceedings contained in the Department's decision are erroneous. Although I note the lack of support in the record for the challenged findings and statements, the consideration of the remaining issues is unnecessary because the Department's decision is reversed on the grounds discussed above. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (concluding that an appellate

[2] Hickey v. Forkner, 4:10-CV-02696-TLW-TER (D.S.C. 2010)

court need not address remaining issues when disposition of a prior issue is dispositive of the case).

ORDER

IT IS HEREBY ORDERED that, the Decision of the South Carolina Department of Health & Human Services reducing Appellant's PCA II services from 50 hours per week to 28 hours per week is **REVERSED**.

IT IS FURTHER ORDERED that before taking further action to reduce Appellant's benefits under the MR/RD waiver, the Department must provide Appellant with a hearing consistent with this Order and Decision; the benefit limitations contained in the January 1, 2010 MR/RD waiver renewal may not serve as the legal basis for a reduction in benefits unless they are promulgated pursuant to the requirements of the South Carolina Administrative Procedures Act.

AND IT IS SO ORDERED.

Deborah Brooks Durden
Administrative Law Judge

July 19, 2011
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, Robin E. Coleman, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).

Robin E. Coleman

Robin E. Coleman
Judicial Aide to Deborah Brooks Durden

July 19, 2011
Columbia, South Carolina

FILED
July 19, 2011
SC ADMIN. LAW COURT

ATTACHMENT E

Not Reported in F.Supp.2d, 2011 WL 5838976 (N.D.Ind.), 44 NDLR P 76
(Cite as: 2011 WL 5838976 (N.D.Ind.))

Editor's Note: Additions are indicated by Text and deletions by ~~Text~~.
Only the Westlaw citation is currently available.

United States District Court,
N.D. Indiana.
B.N., by his mother and next friend A.N., on behalf of himself and a class of those similarly situated,
Plaintiffs,
v.
Anne Waltermann MURPHY, et al, Defendants.

Cause No. 3:09–CV–199–TLS.
Nov. 16, 2011.

Gavin M. Rose, ACLU of Indiana, Indianapolis, IN, for Plaintiffs.

Betsy M. Isenberg, Indiana Attorney General's Office—IAG/302, Indianapolis, IN, for Defendants.

OPINION AND ORDER

THERESA L. SPRINGMANN, District Judge.

***1** The Plaintiff, B.N., on behalf of himself and a putative class of others similarly situated, has sued Anne Waltermann Murphy, in her official capacity as Secretary of the Indiana Family and Social Services Administration; Pat Casanova, in her official capacity as Interim Director of the Office of Medicaid Policy and Planning; and Megan Ornellas, in her official capacity as Director of the Division of Aging. The Plaintiff asks for declaratory and injunctive relief because a 2008 policy by the Indiana Family and Social Services Administration limits the number of hours of respite care services per month available to individual enrollees under the Aged and Disabled Waiver program. B.N., through his mother A.N., filed suit in LaPorte County, Indiana, on April 14, 2009, alleging violations of the Americans with Disabilities Act of 1990, the Rehabilitation Act of 1973, federal Medicaid law, and the Indiana Code's promulgation requirements. On May 1, 2009, the Defendants removed the case to this Court pursuant to 28 U.S.C. § 1331 and § 1367. On June 11, 2009, the Plaintiff filed a First Amended Class Action Complaint for Declaratory and Injunctive Relief [ECF No. 20], alleging the same violations as before, and additionally alleging violation of Indiana state Medicaid law. Also on June 11, the Plaintiff filed an Amended Motion for Class Certification [ECF No. 21] with a corresponding Memorandum of Law in Support of Amended Motion for Class Certification [ECF No. 22]. On June 29, 2009, the Defendants filed Defendants' Memorandum of Law in Opposition to Plaintiff's Amended Motion for Class Certification [ECF No. 25], and after subsequent investigation filed Defendants' Supplemental Brief and Evidentiary Materials in Opposition to Plaintiff's Amended Motion for Class Certification [ECF No. 35]. The Plaintiff responded on October 15, 2009, with Plaintiffs' Reply in Support of Amended Motion for Class Certification [ECF No. 38]. In an Opinion and Order dated September 27, 2011 [ECF No. 72], this Court denied the Plaintiff's Amended Motion for Class Certification because the Plaintiff failed to establish the numerosity required to bring a class action under Rule 23(a)(1).

The Plaintiff filed a Motion for Summary Judgment on October 15, 2009 [ECF No. 39], along with a Memorandum in Support [ECF No. 40]. The Defendants responded with their own Motion for Summary Judgment on December 31, 2009 [ECF No. 45], along with a Brief in Support [ECF No. 46]. The Plaintiff filed a Reply on January 25, 2010 [ECF No. 49]. On March 8, 2010, the Clay Superior Court, Clay County, Indiana, granted summary judgment to a class of plaintiffs similarly-situated to the Plaintiff, in a case involving a nearly-identical state policy [ECF No. 50–4]. This Court granted the Plaintiff leave to file a brief discussing collateral estoppel. The Plaintiff filed such a brief on April 30, 2010 [ECF No. 55], the Defendants responded on May 14, 2010 [ECF No. 58], and the Plaintiff replied on May 24, 2010 [ECF No. 62].

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The parties agree there are no facts in dispute and this case is ready to be resolved on the cross Motions for Summary Judgment.

BACKGROUND

*2 The Plaintiff is a severely handicapped minor [FN1] who resides in LaPorte County, Indiana. He lives with his parents, and due to cerebral palsy and other developmental handicaps, requires nearly constant care. He cannot walk, talk, or eat, and is therefore fed by a tube inserted into his small intestine. Additionally, he cannot toilet, and therefore still wears diapers.

> FN1. In June 2009, B.N. was eight years old. (First Am. Verified Class Action Compl. for Declaratory and Injunctive Relief, ¶ 25, ECF No. 20.)

Indiana participates in the federal Medicaid program, providing medical services to many low-income individuals through the Indiana Family and Social Services Administration. To receive federal matching funds, Indiana's Medicaid program must be approved by the United States Department of Health and Human Services. Under federal Medicaid law, the Department of Health and Human Services may waive certain Medicaid requirements for states that provide "home or community-based services" for individuals who would otherwise require institutionalizing as long as:

> the average per capita expenditure estimated by the State in any fiscal year for medical assistance provided with respect to such individuals does not exceed 100 percent of the average per capita expenditure that the State reasonably estimates would have been made in that fiscal year for expenditures under the State plan for such individuals if the waiver had not been granted.

42 U.S.C. § 1396n(c)(2)(D). In early 2008, the Indiana Family and Social Services Administration submitted a waiver request to the Department of Health and Human Services. One of the waiver provisions was a sixty hour per month limit on respite care services available to individuals enrolled in Indiana's Aged and Disabled Waiver program. Prior to this waiver provision, many individuals in Indiana were being approved for more than sixty hours per month in respite care services. In May 2008, the Department of Health and Human Services approved Indiana's requested waiver, and the sixty hour limitation went into effect in July 2008. It is undisputed that the state undertook no studies to determine the probable effect of its cap on those receiving care under the Waiver program. (Filler Dep. 76–77, ECF No. 39–3.) In her deposition, Karen Filler, Deputy Director of the Division of Aging, stated that the purpose of the caps was to fund services through the Medicaid prior authorization program instead of the waiver program (*Id.* 126–28 ("[the cap on respite services] was not meant to curtail any services to individuals, it was only meant to make sure that the proper funding sources were used.").) It is also undisputed that although the cost of care in the community versus the cost of institutionalizing was noted in the application for waiver services, cost of community care did not determine whether the state gave waiver services. (*Id.* 18–19.) Finally, it is undisputed that the state made no effort to promulgate the sixty-hour cap on respite services in accordance with Indiana's Administrative Rules and Procedures Act (ARPA), Ind.Code § 4–22–2–1, *et seq.* (Defs.' Resps. to Pl.'s Interrogs. ¶ 3, ECF No. 39–6.)

*3 The evidence before the Court shows that many individuals in Indiana are eligible to receive funding for home or community-based services through the Medicaid prior authorization program, and that—as the agency intended—many individuals in Indiana who were previously approved for more than sixty hours of respite care services under the Aged and Disabled Waiver program were able to find providers and funding for the hours they needed in excess of sixty hours through the Medicaid prior authorization program. (Def.'s Mem. of Law Opp'n Pl.'s Am. Mot. for Class Certification 2, ECF No. 25.) However, the evidence also shows that at least thirteen individuals were unable to ob-

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tain replacement funding through the Medicaid prior authorization program when the state began enforcing the sixty hour cap on respite care services. (Pl.'s Reply Supp. Mot. Summ. J. 3, ECF No. 49; Filler Dep. 143.) The Plaintiff is one of the individuals who could not obtain replacement services through prior authorization.

Prior to 2008, the Plaintiff received a combination of in-home nursing services. He received fifty hours per month of in-home nursing services through the Medicaid prior authorization program, but these services were only available during the day on weekdays. He also received eighty hours per month of respite care services through the Aged and Disabled Waiver program. When the sixty hour per month cap went into effect, the Plaintiff applied for eighty hours of respite care services per month and was denied. He subsequently applied for sixty hours of respite care services per month and that request was approved. Because of the specifics of the Plaintiff's case, he was unable to make up the difference with funding from the Medicaid prior authorization program. Some of the reasons that the Plaintiff and others could not get prior authorization funding for the needed hours in excess of sixty include limited numbers of licensed prior authorization providers, limited geographic dispersion of prior authorization providers, and limited ability of prior authorization providers to take on new clients or hours. (Filler Dep. 83–85, 138–39.)

STANDARD OF REVIEW

The Federal Rules of Civil Procedure provide that motions for summary judgment should be granted "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). A genuine issue of material fact exists when " 'there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party.' " *AA Sales & Assocs. v. Coni–Seal, Inc.*, 550 F.3d 605, 608–09 (7th Cir.2000) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). Under Rule 56(e)(2), a party opposing a properly made and supported motion for summary judgment "may not rely merely on allegations or denials in its own pleading; rather its response must—by affidavits or as otherwise provided in this rule—set out specific facts showing a genuine issue for trial." If appropriate, summary judgment should be entered against a party who fails to so respond. Fed.R.Civ.P. 56(e)(2); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) (holding that a court should enter summary judgment, after adequate time for discovery, against a party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial"). A court's role on summary judgment is not to weigh the evidence, make credibility determinations, or decide which inferences to draw from the facts, but instead to determine whether there is a genuine issue of triable fact. *Anderson*, 477 U.S. at 255; *Washington v. Haupert*, 481 F.3d 543, 550 (7th Cir.2007); *Payne v. Pauley*, 337 F.3d 767, 770 (7th Cir.2003). Thus, a court in ruling on a summary judgment motion construes all facts in the light most favorable to the nonmoving party and draws all reasonable inferences in that party's favor. *AA Sales & Assocs.*, 550 F.3d at 609. However, the court is not required to draw every conceivable inference from the record—only reasonable ones. *Spring v. Sheboygan Area Sch. Dist.*, 865 F.2d 883, 886 (7th Cir.1989). Under local rule, facts that are submitted by the moving party and supported by admissible evidence are considered to exist without controversy, except to the extent that such facts are controverted in a "Statement of Genuine Issues" filed in opposition to the motion. L.R. 56.1.

DISCUSSION

*4 The Plaintiff offers four bases for declaratory and injunctive relief against the 2008 policy capping respite care services at sixty hours per month under the Aged and Disabled Waiver program. The Plaintiff argues: 1) the policy is a "rule"

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within the meaning of the Indiana Administrative Rules and Procedures Act (ARPA), and violates the ARPA because it has not been properly promulgated; 2) the policy violates the Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973 because it will have the effect of forced institutionalization when the state could reasonably accommodate the Plaintiff in his home; 3) the policy violates state Medicaid law because State of Indiana Medicaid programs must pay for medically necessary services; and 4) the policy violates federal Medicaid law because federal regulations require states to provide coverage for medically necessary services. The Defendants urge that: 1) either the policy is not a rule, or it was promulgated as part of an earlier Indiana rule; 2) the policy does not violate the ADA or the RA because services are still available under prior authorization, and because the policy is neutral on its face; 3) the policy does not violate state Medicaid law because services are available through prior authorization; and 4) the policy does not violate federal Medicaid law because it was approved by the Department of Health and Human Services, and the Court should defer to the agency's interpretation of the statute and regulations it is charged with administering. Because the Court determines that the Plaintiff is entitled to relief on multiple bases, the Court will grant the Plaintiff's Motion for Summary Judgment.

A. The State Policy Violates Indiana's Administrative Rules and Procedures Act

Under Indiana's ARPA, state administrative agencies may issue rules having the effect of law as long as those rules are properly promulgated. Ind.Code § 4–22–2–13 *et seq.* Promulgation requires publishing notice of intent to adopt a rule, *id.* § 4–22–2–23, publishing notice of a public hearing on the rule, *id.* § 4–22–2–24, conducting a public hearing and allowing public comment, *id.* § 4–22–2–26, formally adopting a rule consistent with the published rule, *id.* § 4–22–2–29, submitting the proposed rule to the attorney general for legal review, *id.* § 4–22–2–31 & 32, submitting the proposed rule to the governor for approval, *id.* § 4–22–2–33 & 34, and submitting the proposed rule to the secretary of state for publishing, *id.* § 4–22–2–35. A rule that is improperly promulgated is invalid and does not have the effect of law. *Id.* § 4–22–2–44; *Ind.-Ky. Elec. Corp. v. Comm'r, Ind. Dept. Of Envtl. Mgmt.*, 820 N.E.2d 771, 780 (Ind.Ct.App.2005) (invalidating a rule that was not properly promulgated). Indiana law defines a "rule" as "the whole or any part of an agency statement of general applicability that ... has or is designed to have the effect of law; and ... implements, interprets, or prescribes ... law or policy; or ... the organization, procedure, or practice requirements of an agency." Ind.Code § 4–22–2–3(b).

***5** The Defendants argue that the state's sixty hour cap on respite services is merely an internal policy and does not amount to a rule, but this argument fails.[FN2] The state's sixty hour cap has general applicability to all individuals in Indiana receiving services under the Aged and Disabled Waiver program. The cap is designed to have the effect of law, and it implements law in a way that affects substantive rights by denying services to which individuals would otherwise be entitled. Such a cap meets the definition of a rule under Indiana law, is more than a merely internal policy, and, absent promulgation, is invalid. *Blinzinger v. Americana Healthcare Corp.*, 466 N.E.2d 1371, 1375 (Ind.Ct.App.1984) (finding invalid an unpromulgated agency directive which applied generally, prospectively, with the effect of law, and which affected substantive rights); *Ind. Dept.of Envtl. Mgmt. v. AMAX, Inc.*, 529 N.E.2d 1209, 1212–13 (Ind.Ct.App.1988) (finding invalid an unpromulgated agency policy that applied generally, prospectively, and with the effect of law).

FN2. The Plaintiff argues in his Supplemental Brief Addressing Collateral Estoppel Effect of Supplemental Authority [ECF No. 55] that the Defendants' only argument on the question of promulgation under the ARPA is that the sixty hour cap was previously promulgated, and thus that collateral

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> estoppel is appropriate because the Defendants' only argument is precluded. This is not accurate. The Defendants also argue in opposition to the Plaintiff's Motion for Summary Judgment that the sixty hour cap is not a "rule" within the meaning of the term under the ARPA. (Defs.' Br. Supp. Mot. Summ. J. 8, ECF No. 46.) Thus, the Court determines that collateral estoppel is inappropriate, and, in any case, since the Court agrees with the Plaintiff that the sixty hour cap does not comport with the promulgation requirements of the ARPA, the Court finds the issue of collateral estoppel to be moot.

The Defendants also argue that proper promulgation of Title 460 of the Indiana Administrative Code incorporates by reference the sixty hour cap on respite care services, and thus the cap has been promulgated consistent with the ARPA. This argument fails because Title 460 was promulgated more than a year before the sixty hour cap went into effect. Title 460 was promulgated by the Indiana Family and Social Services Administration in September 2006, and it included language describing Medicaid waiver programs for "home and community based services for the aged and disabled." 460 Ind. Admin. Code 1.2–3–1(a)(1). But the sixty hour cap on respite services was not proposed until 2008, (Filler Dep. 34–36), and when it was approved, it was assigned a different control number from the waiver provision that was promulgated in Title 460 of the Indiana Administrative Code. *Compare* 460 Ind. Admin. Code 1.2–3–1(a) (1) *with* CMS Approval Letter, Filler Dep. Ex. 8, ECF No. 39–4. The Defendants' argument that the cap was previously promulgated fails because the previous reference was to an entirely different waiver program. The sixty hour cap on respite services which was approved by the Department of Health and Human Services in 2008 has never been properly promulgated under Indiana law, and is therefore void. Accordingly, the Plaintiff is entitled to judgment on the basis of the Defendants' failure to comply with the provisions of the Indiana ARPA.

B. The State Policy Violates the ADA and the RA

The Americans with Disabilities Act of 1990 (the ADA) states that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. The ADA defines a qualified individual with a disability as "an individual with a disability who, with or without reasonable modifications to rules, policies, or practices ... meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." *Id.* § 12131(2). The ADA defines a public entity as "any State or local government" or "any department, agency ... or other instrumentality of a State ... or local government." *Id.* § 12131(1). The Rehabilitation Act of 1973 (the RA) has a similar provision, prohibiting discrimination against disabled individuals by any entity receiving federal funding. 29 U.S.C. § 794. Because of the similar language in the ADA and the RA when applied to public entities receiving federal funding, courts "construe the two provisions as co-extensive." *Sanchez v. Johnson,* 416 F.3d 1051, 1062 (9th Cir.2005); *see also Radaszewski ex rel. Radaszewski v. Maram,* 383 F.3d 599, 607 (7th Cir.2004) ("courts construe and apply [the ADA and the RA] in a consistent manner"); *Lovell v. Chandler,* 303 F.3d 1039, 1052 (9th Cir.2002) (outlining the provisions of the ADA and the RA, and finding that the same conduct violated both); *Helen L. v. DiDario,* 46 F.3d 325, 331–32 (3d Cir.1995) (discussing the similarities between the ADA and the RA).

*6 Both the ADA and the RA contain an integration mandate. The ADA requires a public entity to "administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R.

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§ 35.130(d). The RA requires an entity receiving federal funding to "administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons." 28 C.F.R. § 41.51(d).

The Supreme Court has analyzed the integration mandate of the ADA. In *Olmstead v. Zimring,* 527 U.S. 581, 119 S.Ct. 2176, 144 L.Ed.2d 540 (1999), the court addressed the question of "whether the proscription of discrimination may require placement of persons with mental disabilities in community settings rather than in institutions." *Id.* at 587. The court held that the answer was "a qualified yes," such action being required when:

> the State's treatment professionals have determined that community placement is appropriate, the transfer from institutional care to a less restrictive setting is not opposed by the affected individual, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities.

Id. Stated differently, "[u]njustified isolation ... is properly regarded as discrimination based on disability." *Id.* at 597. The court noted that not all requests for accommodation are reasonable. A state "[can] resist modifications that 'would fundamentally alter the nature of the service, program, or activity.' " *Id.* (quoting 28 C.F.R. § 35.130(b)(7)). The *Olmstead* court also directed that a court evaluating a fundamental alteration defense "must consider, in view of the resources available to the State, not only the cost of providing community-based care to the litigants, but also the range of services the State provides others with mental disabilities, and the State's obligation to mete out those services equitably." *Id.* Finally, the *Olmstead* court rejected the State's argument that a facially-neutral policy could not violate the ADA. In response to the State's facial neutrality argument, the court responded: "We are satisfied that Congress had a more comprehensive view of the concept of discrimination advanced in the ADA." *Id.* at 598. As the Seventh Circuit has explained, unjustified isolation violates the ADA "even in the absence of traditional proof that the disabled person is being treated differently from a nondisabled person who is otherwise similarly situated." *Radaszewski,* 383 F.3d at 607–08. In a case involving the potential for forced institutionalization, this Court must apply the *Olmstead* court's analysis of the integration mandate under the ADA and the RA.

The Defendants do not appear to challenge a co-extensive analysis of the ADA and the RA, and the Court will analyze the two co-extensively. Further, the Defendants admit the applicability of the integration mandate under both the ADA and the RA. The Defendants even cite *Olmstead's* three-part test for when community placement is required under the integration mandate. But the Defendants decline to apply the three-part test to this case, arguing instead that their conduct does not violate the ADA and the RA for a number of reasons.

*7 First, the Defendants argue that the sixty hour cap will not have the effect of forced institutionalization because those whose respite hours are curtailed may continue to receive funding through the Medicaid prior authorization system. The Defendants' argument fails because the facts before the Court show just the opposite. The facts as shown by the Plaintiff, uncontroverted by the Defendants, are that at least thirteen individuals in Indiana, including the Plaintiff, have been unable to make up the rest of their medically necessary hours through prior authorization. Because it is clear from the record that the state's policy will have the effect of forced institutionalization of the Plaintiff, the only question is whether accommodation of the Plaintiff is reasonable under an *Olmstead* analysis. The Court will return to the *Olmstead* test momentarily.

The Defendants argue, secondly, that the sixty hour cap is permissible because the state agency did not intend to force the institutionalization of Medicaid recipients. Rather, the state's goal was merely to fund medically necessary services through prior

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authorization instead of through waiver services. The Plaintiff counters that intent is irrelevant when the effect of a policy is to violate the ADA and the RA. The Court agrees. The Supreme Court has held that the RA was designed to prevent not just purposeful discrimination, but discrimination arising from "benign neglect." *Alexander v. Choate,* 469 U.S. 287, 295, 105 S.Ct. 712, 83 L.Ed.2d 661 (1985). The reason the RA must proscribe policies which inadvertently discriminate against the handicapped is that "much of the conduct that Congress sought to alter in passing the Rehabilitation Act would be difficult if not impossible to reach were the Act construed to proscribe only conduct fueled by a discriminatory intent." *Id.* at 296–97. The same logic applies to the ADA. As the Third Circuit has explained, "[b]ecause the ADA evolved from an attempt to remedy the effects of 'benign neglect' resulting from the 'invisibility' of the disabled, Congress could not have intended to limit the Act's protections and prohibitions to circumstances involving deliberate discrimination." *Helen L.,* 46 F.3d at 335. Insofar as the Defendants argue explicitly and implicitly that their lack of discriminatory animus should save the sixty hour cap under the ADA and the RA, the Court rejects that argument.

Next, the Defendants argue that *Olmstead* does not require a certain standard of care under the ADA, but merely requires "that States must adhere to the ADA's nondiscrimination requirement with regard to the services they in fact provide," *Olmstead,* 527 U.S. at 603 n. 14, and that by asking the state to prevent his institutionalization, the Plaintiff is asking for a standard of care not required by the ADA. The Defendants' argument continues with an exposition of the facial neutrality espoused by the Supreme Court in *Alexander v. Choate.* In *Alexander,* the court held that a Tennessee Medicaid cap on the number of days reimbursable for inpatient hospital stays did not violate the RA because it applied equally to handicapped and non-handicapped individuals. *See Alexander,* 469 U.S. at 303. The court continued, "[t]o conclude otherwise would be to find that the Rehabilitation Act requires States to view certain illnesses, *i.e.* those particularly affecting the handicapped, as more important than others." *Id.* at 303–04. Finally, the *Alexander* court noted that "[the RA] does not, however, guarantee the handicapped equal results from the provision of state Medicaid, even assuming some measure of equality of health could be constructed." *Id.* at 304. The Defendants argue that because the sixty hour cap is neutral on its face, it does not violate the ADA or the RA even if it has the effect of forced institutionalization.

***8** The Defendants' argument fails because *Olmstead* has set a higher bar for cases of forced institutionalization. Notably, *Alexander* did not involve forced institutionalization, so that court's holdings are distinguishable from *Olmstead,* where the Supreme Court set out an unequivocal application of the integration mandate for forced institutionalization cases. Even before *Olmstead,* the Third Circuit noted that the integration mandate would require a different result from a pure facial neutrality analysis. *Helen L.,* 46 F.3d at 336 (discussing *Traynor v. Turnage,* 485 U.S. 535, 108 S.Ct. 1372, 99 L.Ed.2d 618 (1988)-another Supreme Court case espousing facial neutrality under the RA-the Third Circuit pointed out that "the [*Traynor*] court was not concerned with the application of the integration mandate, or anything analogous to it, and the holding is not germane to our analysis."). In fact, the facial neutrality argument was espoused again by the *Olmstead dissent,* which specifically referenced the *Alexander* facial neutrality standard, arguing that facial neutrality should remain the law. *Olmstead,* 527 U.S. at 619 (Thomas, J., dissenting). But the *Olmstead* court expressly rejected that argument when it stated that "Congress had a more comprehensive view of the concept of discrimination advanced in the ADA." *Id.* at 598. The *Olmstead* majority called the dissent's notion of facial neutrality as well-established precedent "incorrect as a matter of precedent and logic." *Id.* at 598 n. 10. The *Olmstead* test—which the Defendants did not apply in their brief—is the law.

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Applying the three-part test from *Olmstead,* the first two requirements are unquestionably met. First, the state's treatment professionals have already determined that community placement is appropriate for the Plaintiff; and second, the Plaintiff does not oppose community placement. *Id.* at 587. The only question remaining is whether "the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with ... disabilities." *Id.* Stated differently, the Defendants could fend off an attack on the sixty hour cap by arguing that accommodating the Plaintiff would require a fundamental alteration of the state's Medicaid program. *Id.* at 597.

A notable consequence of the Defendants' failure to apply the three-part *Olmstead* test is that neither the words fundamental alteration nor reasonable accommodation appear in the Defendants' brief.[FN3] The closest reference to a fundamental alteration defense comes in the Defendants' attempt to distinguish *Crabtree v. Goetz.* The Defendants note that the *Crabtree* court struck down Tennessee's thirty-five hour per month cap on in-home nursing services provided under a Medicaid waiver program in part because Tennessee did not have a "plan 'demonstrat[ing] a reasonably specific and measurable commitment to deinstitutionalization for which [Tennessee] may be held accountable.' " *Crabtree v. Goetz,* No. Civ.A. 3:08–0939, 2008 WL 5330506, at *29 (M.D.Tenn. Dec.19, 2008) (quoting *Frederick L. v. Dep't of Public Welfare,* 422 F.3d 151, 157 (3d Cir.2005)). Evidence of such a plan would establish a fundamental alteration defense because if such a plan existed, then demanding that the state make modifications "would result in a 'fundamental alteration' of the state's ... system." *Frederick L.,* 422 F.3d at 157; *Olmstead,* 527 U.S. at 605–06 ("If ... the State were to demonstrate that it had a comprehensive, effectively working plan for placing qualified persons with ... disabilities in less restrictive settings, and a waiting list that moved at a reasonable pace ... the reasonable-modifications standard would be met."). The Defendants argue that the Indiana waiver program is a plan demonstrating commitment to deinstitutionalization, and therefore the Indiana cap should stand where the Tennessee cap fell. The Court disagrees. The Defendants have not established a fundamental alteration defense; on the contrary, the facts before the Court show that the Indiana sixty hour cap is similar to the Tennessee thirty-five hour cap in that, far from establishing a fundamental alteration defense, it will have "the reverse effect to institutionalize the Plaintiff[ ]." *Id.* at *30.

FN3. The Court has considered the Plaintiff's argument that the Defendants have waived a fundamental alteration defense by not affirmatively pleading it. *See Gorman v. Bartch,* 152 F.3d 907, 912 (8th Cir.1998) (describing the fundamental alteration defense as an affirmative defense); *Johnson v. Gambrinus Co.,* 116 F.3d 1052, 1059 (5th Cir.1997) (defendant must "plead[ ] and meet[ ] its burden of proving that the requested modification would fundamentally alter the nature of the public accommodation"); *Steinle v. Warren,* 765 F.2d 95, 101 (7th Cir.1985) (affirmative defenses not pled are waived); *see also* Fed.R.Civ.P. 12(b). The Court notes the Plaintiff has not pointed to a case where a fundamental alteration defense was considered to be waived for failure to affirmatively plead it. In any case, the Court need not reach the issue of waiver since the Court determines that the Defendants do not have a fundamental alteration defense. Finally, the Court notes that when viewed in a light most favorable to the party not moving for summary judgment on this issue, the Defendants have pled and argued a fundamental alteration defense. They have done so by pleading the availability of prior authorization funding as an affirmative defense. (Defs.' Answer & Affirmative Defenses ¶ 7, ECF No. 24.) If the facts bore out such a theory, then requiring the Defendants to accommodate the Plaintiff's re-

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quest would be a fundamental alteration of the state's program. Additionally, as articulated below in the discussion of *Crabtree v. Goetz,* the Defendants' Motion for Summary Judgment contains at least the hint of a fundamental alteration defense.

*9 Moreover, the Plaintiff presents compelling arguments for why no fundamental alteration defense is available to the Defendants. First, the Defendants have not identified a single case where a state successfully relied on a fundamental alteration defense when the state was previously providing particular services to the Plaintiff in the community and later decided to curtail those services. In *Radeszewski,* the Seventh Circuit reversed the district court's summary judgment holding that the State of Illinois could not reasonably accommodate the plaintiff without a fundamental alteration of its Medicaid program. *See Radeszeswski,* 383 F.3d at 615. Illinois had been accommodating the plaintiff in his home until his twenty-first birthday, but declined to offer the same number of hours of services once he reached age twenty-one. *Id.* at 602. The Seventh Circuit remanded to determine how much it would cost to continue to serve the plaintiff in his home, even though the plaintiff was asking the state to accommodate a level of in-home services that the state had never previously provided to individuals over the age of twenty-one. *Id.* at 609, 614. The Defendants' fundamental alteration defense is weaker than Illinois's fundamental alteration defense that was ultimately rejected in *Radeszeswski.*[FN4] Though Illinois had served the *Radeszeswski* defendant in his home until age twenty-one, the Illinois Medicaid program had never previously provided so many hours of services to adults, whereas the Indiana sixty hour cap curtails the exact services that were previously provided to the Plaintiff and other similarly-situated individuals. *See also Fisher v. Okla. Health Care Auth.,* 335 F.3d 1175, 1183 (10th Cir.2003) (reversing district court's grant of summary judgment to the State of Oklahoma on a fundamental alteration defense and noting that the plaintiffs "are not demanding a separate service or one not already provided by the state").

FN4. On remand, the district court rejected Illinois's fundamental alteration defense, holding that "the unrebutted evidence clearly shows that the cost of caring for [the plaintiff] in the proper institutional setting—a hospital—would be substantially greater than the cost of allowing [the plaintiff] to remain in the community and receive the same proper treatment and health care. Allowing [the plaintiff] to remain in the community can be readily accommodated, taking into account Illinois' resources and the needs of others with similar disabilities." *Radaszewski ex rel. Radaszeswki v. Maram,* No. 01 C 9551, 2008 WL 2097382, at *15 (N.D.Ill. Mar.26, 2008).

Furthermore, the defendant in *Radeszewski* argued that the *cost* of accommodating the plaintiff would cause a fundamental alteration in the state's Medicaid program. Indeed, the Supreme Court has noted that cost is the key factor in a fundamental alteration defense. *Olmstead,* 527 U.S. at 603–04 (describing the fundamental alteration defense analysis as concerning "the allocation of available resources"). Yet the Defendants have expressly rejected a cost argument. As Karen Filler affirmed in her deposition, cost-feasibility was never part of the state's analysis about whether to provide services in the community under the waiver program. (Filler Dep. 18–19.) Filler further stated that the sixty hour cap was "not meant to curtail any services to individuals, it was only meant to make sure that the proper funding sources were used." (*Id.* 128.) The Defendants argue explicitly that the sixty hour caps were instituted not out of a desire to cut costs, but merely to more appropriately pay for the same services with different funds. (Defs.' Br. Supp. Mot. Summ. J. 14.) The Defendants' argument puts this case squarely in line with *Helen L.,* where the Third Circuit rejected the Commonwealth of

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Pennsylvania's fundamental alteration defense. Pennsylvania was requiring the plaintiffs to receive care under its nursing home program instead of its attendant care program, 46 F.3d at 327, claiming that it would be a fundamental alteration of its attendant care program to ask it to accommodate the plaintiffs where the two programs were "funded on two separate lines of [Pennsylvania's] budget." *Id.* at 338. Just as Pennsylvania could not claim a fundamental alteration defense where the only required alteration was a restructuring of budget line items, so the Defendants cannot claim a fundamental alteration defense where the only required alteration would be a restructuring of the budget vis-a-vis the waiver program and the Medicaid prior authorization system. *See also Townsend v. Quasim,* 328 F.3d 511, 517 (9th Cir.2003) (reversing district court's grant of summary judgment to the State of Washington and district court's holding that state's failure to provide community based services was not an ADA violation where "the precise issue is not whether to provide the ... services sought by [the plaintiff] ... but in what location these services will be provided.").

***10** Finally, the Defendants have not asserted that it will cost more to accommodate the Plaintiff and others similarly-situated in their homes than it would cost to meet their needs in an institutional setting. (Pl.'s Mot. Summ. J. 21.) As the *Olmstead* court articulated, a fundamental alteration analysis must include consideration, "in view of the resources available to the State, not only [of] the cost of providing community-based care to the litigants, but also the range of services the State provides others with ... disabilities, and the State's obligation to mete out those services equitably." *Olmstead,* 527 U.S. at 597. The Seventh Circuit has interpreted this language to mean that a court must consider the costs of accommodating the plaintiff against the costs of serving others with disabilities similar to those of the plaintiff. *Radaszewski,* 383 F.3d at 614 n. 5. The evidence before the Court is that it would cost significantly less to serve the Plaintiff and others similarly-situated in community settings than it would cost to institutionalize them. (CMS Approval Letter, Filler Dep. Ex. 8, ECF No. 39–4.) This, again, places the Plaintiff's claims squarely within the analysis of the Third Circuit in *Helen L.* There, the court noted the irony of the state's attempt to resist on the "justification of administrative convenience" an accommodation that would save the state considerable money, allow the plaintiff to continue living at home and interacting with family, and not require a substantive change in the programs the state was already providing. *Helen L.,* 46 F.3d at 338. *See also Radaszewski ex rel. Radaszeswki v. Maram,* No. 01 C 9551, 2008 WL 2097382, at *15 (N.D.Ill. Mar.26, 2008) ("The unrebutted evidence clearly shows that the cost of caring for [the plaintiff] in the proper institutional setting—a hospital—would be substantially greater than the cost of allowing [the plaintiff] to remain in the community."). The Defendants' attempt to resist accommodation of the Plaintiff is illogical for the same reasons, and does not form the basis for a fundamental alteration defense.

Because the Defendants have failed to show that accommodation of the Plaintiff would require a fundamental alteration of the state's programs, the sixty hour cap on respite services fails the *Olmstead* test and therefore violates the integration mandate of the ADA and the RA. Accordingly, declaratory and injunctive relief is proper on this basis as well.

C. The State Policy Violates State Medicaid Law

Indiana Medicaid law provides that state Medicaid services must include "limitations that are consistent with medical necessity concerning the amount, scope, and duration of the services and supplies to be provided." Ind.Code § 12–15–21–3(3). The Indiana Court of Appeals has called this statutory language "unequivocal." *Thie v. Davis,* 688 N.E.2d 182, 186 (Ind.Ct.App.1997). "According to the statute, the State Medicaid coverage limitations must be 'consistent with medical necessity.' The statute thus establishes a precept: medically necessary treatment must be covered." *Id.*

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*11 The Defendants do not deny that the Indiana Family and Social Services Administration has determined that more than sixty hours per month of respite care services are medically necessary for the Plaintiff. The Defendants merely argue that there is no denial of medically necessary services under Indiana Medicaid law because the needed services "may be reimbursed either through the State's Aged and Disabled Waiver Program or through prior authorization under traditional Medicaid." (Defs.' Br. Supp. Mot. Summ. J. 15.) The Plaintiff points out that "[a]lthough the State vaguely asserts that no ... individual is forced to go without medically necessary services, the undisputed facts of this case demonstrate that persons *are* forced to go without such services." (Pls.' Reply Supp. Mot. Summ. J. 24.) Specifically, as previously discussed, the undisputed facts before the Court are that the Plaintiff is unable to obtain needed services through the prior authorization program. Because the sixty hour cap has the effect of depriving the Plaintiff of medically necessary services, the cap violates Indiana Medicaid law, and declaratory and injunctive relief is appropriate in favor of the Plaintiff.

D. The State Policy and Federal Medicaid Law

The Plaintiff argues, finally, that the state's sixty hour cap on respite care services violates federal Medicaid law. Federal law requires that each service provided under state Medicaid plans be "sufficient in amount, duration, and scope to reasonably achieve its purpose." 42 C.F.R. § 440.230(b). Furthermore, federal law allows "appropriate limits on a service based on such criteria as medical necessity." *Id.* § 440.230(d). In *Weaver v. Reagen,* the Eighth Circuit noted the Supreme Court's interpretation requiring that "a state Medicaid plan provide treatment that is deemed 'medically necessary' in order to comport with the objectives of the Act." 886 F.2d 194, 198 (8th Cir.1989) (citing *Beal v. Doe,* 432 U.S. 438, 444–45, 97 S.Ct. 2366, 53 L.Ed.2d 464 (1977) ("serious statutory questions might be presented if a state Medicaid plan excluded necessary medical treatment from its coverage")).

The Defendants argue that because the sixty hour cap in question was approved by the Centers for Medicare and Medicaid Services (CMS), an agency within the Department of Health and Human Services (HHS), this Court should defer to the agency determination that the cap comports with state and federal Medicaid law. The Plaintiff argues that no agency deference is appropriate with respect to the statutes and regulations not administered by CMS, including the Indiana ARPA, the ADA and the RA, and Indiana Medicaid law. The Plaintiff argues further that no agency deference is appropriate on the federal Medicaid issue because CMS could not have known that the cap would have the effect of denying medically necessary services.

As an initial matter, the Court agrees with the Plaintiff that no agency deference is appropriate with respect to statutes not administered by CMS. CMS "is charged with administering the Medicaid Act," *Moore ex rel. Moore v. Reese,* 637 F.3d 1220, 1235 (11th Cir.2011), but no evidence before the Court suggests that CMS administers the Indiana ARPA, the ADA, the RA, or Indiana's Medicaid statutes. Thus, if agency deference to CMS is appropriate, it could only be on the agency determination that the sixty hour cap comports with the Medicaid Act.

*12 CMS did make a determination that the waiver including the sixty hour cap on respite services comports with the Medicaid Act. (CMS Approval Letter, Filler Dep. Ex. 8, ECF No. 39–4.); *see also S.D. ex rel. Dickson v. Hood,* 391 F.3d 581, 595–96 (5th Cir.2004) ("As the agency entrusted with the administration of the Medicaid statute, CMS is required to determine that each state plan is in conformity with the specific requirements of the Medicaid act."); *Cmty. Health Ctr. v. Wilson–Coker,* 311 F.3d 132, 134 (2d Cir.2002) ("[CMS] reviews each plan to assure that it complies with a long list of federal statutory and regulatory requirements."). Furthermore, the Defendants are correct that CMS, as the agency that administers the Medicaid Act, deserves deference when it interprets

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Medicaid regulations, so long as its interpretations are not "plainly erroneous or inconsistent with the regulation." *Air Brake Sys., Inc. v. Mineta,* 357 F.3d 632, 643–44 (6th Cir.2004) (quoting *Bowles v. Seminole Rock & Sand Co.,* 325 U.S. 410, 414, 65 S.Ct. 1215, 89 L.Ed. 1700 (1945)).

The Plaintiff argues that CMS did not have full information about the effect the cap would have on waiver enrollees. But the record does not show that the state was somehow deficient in submitting its request for approval to CMS. Nothing before the Court indicates that the state was required to submit additional studies on the long-term effects of the cap. On its face, it appears that the state complied with CMS requirements, and that CMS determined the state policy comported with federal Medicaid law.

The Plaintiff is entitled to declaratory and injunctive relief on other grounds, as explained above, whether the sixty hour cap violates federal Medicaid law or comports with federal Medicaid law. The Court, therefore, need not determine if the agency determination that the sixty hour cap comports with federal Medicaid law was correct.

CONCLUSION AND ORDER

The Plaintiff is entitled to declaratory and injunctive relief because the sixty hour cap on respite services under the Aged and Disabled Waiver program violates the Indiana ARPA, violates the ADA and the RA, and violates Indiana Medicaid law. Accordingly, the Plaintiff's Motion for Summary Judgment [ECF No. 39] is GRANTED and the Defendants' Motion for Summary Judgment [ECF No. 45] is DENIED.

The Court WITHHOLDS entry of any final order granting declaratory judgment and injunctive relief until it has conferred with the parties at a telephonic status conference to be held on November 29 at 11 AM. The Court will initiate the call.

SO ORDERED.

N.D.Ind.,2011.
B.N. ex rel. A.N. v. Murphy
Not Reported in F.Supp.2d, 2011 WL 5838976 (N.D.Ind.), 44 NDLR P 76

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STATE OF SOUTH CAROLINA COUNTY OF RICHLAND Protection and Advocacy for the People with Disabilities, Inc., et al., Plaintiffs, v. South Carolina Department of Disabilities and Special Needs; et al., Defendants.	IN THE COURT OF COMMON PLEAS Civil Action No. 07-CP-40-2187 **DEFENDANTS' SUPPLEMENTAL MEMORANDUM ON SUMMARY JUDGMENT**

STATEMENT

The present Memorandum responds to certain claims and arguments set forth in Plaintiff's Memorandum in Support of It's[1] Motion for Summary Judgment, dated July 31, 2013 (Pl. 7/31/13 Mem."), and supplements prior filings.

ARGUMENT

1. Plaintiffs' new claim pertaining to alleged "binding norms" has never been pled, and has not been proven.

The Complaint in this case was filed in April 2007, over six years ago. The legal claim asserted in the Complaint was that the Defendants had failed to perform statutory duties set forth in the statutes specific to DDSN. Complaint, Paragraphs 39-41 (citing §§ 44-20-220, 44-26-180, and 44-20-790).[2] Reference was made to the APA as well, but no specific section of the APA was cited.

Also absent from the Complaint was any suggestion that Plaintiffs were claiming that DDSN had improperly established "binding norms." That issue was first mentioned, in a very

[1] There are a number of Plaintiffs, not just one.

[2] The claim based on § 44-20-790 appears to have been abandoned.

limited context, in Plaintiffs' May 13, 2010 Memorandum in Opposition to Defendants' Motion for Summary Judgment, pp. 19-21. However, the issue was mentioned only in connection with one fact situation, which turned out to be incorrect in fact. (Plaintiffs had argued that DDSN had determined that it would not provide services to persons with Asperger's Syndrome. *Id.* at 23. As Plaintiffs now recognize, Pl. July 31, 2013 Memorandum at 26, that statement is not factually correct: DDSN does in fact provide such services.)[3]

The response of the Defendants in 2010 was first, to mention that the claim relating to Asperger's Syndrome was factually incorrect, as noted above, second, to note that the "binding norm" theory had not been pled, and third, to note that Plaintiffs had not presented the Court with any specific facts indicating that a genuine issue of fact existed on this point. Defendants' Reply Memorandum, May 28, 2010, at 6-7.

At present, more than three years later, Plaintiffs have never sought to amend their Complaint to raise in proper fashion the "binding norm" issue. Instead, their July 31, 2013, Memorandum has expanded that unpled claim. Pl. 7/31/13 Mem. at 12-13, 18-22. As a result, this claim should not be considered at this late date. Even if it is considered, however, Plaintiffs cannot prevail on it, because they have completely failed to show how they have been injured in fact by the absence of regulations, the point on which their claim is based, as discussed herein.

[3] It is noteworthy that Plaintiffs did not argue in 2010, as they do now, that the "binding norm" theory should entitle them to summary judgment. Instead, they argued that "Whether the agency has established a binding norm with regard to some of its policies is a question of fact." *Id.* at 23. (That claim has subsequently been silently abandoned. Plaintiffs now argue that there is no issue of fact.)

2. **Plaintiffs lack standing to bring this case, because they have shown no injury to themselves and have not presented a justiciable controversy.**

a. **General principles of standing and justiciability.**

As shown below, neither P & A nor the individual Plaintiffs have made a showing of injury in fact to themselves. Instead, they ask for this Court, in effect, to sit as a commission of review to determine in the abstract whether DDSN needs to promulgate regulations in certain contexts. However, Plaintiffs' concept of this Court's role in this matter is far removed from the normal principles of justiciability, standing, and actual injury in fact to the plaintiffs in litigation, which must be shown before relief will be granted by a court.

The law in South Carolina on issues of justiciability and standing has been summarized by the Court of Appeals as follows:

> A threshold inquiry for any court is a determination of justiciability, *i.e.*, whether the litigation presents an active case or controversy." *Lennon v. S.C. Coastal Council*, 330 S.C. 414, 415, 498 S.E.2d 906, 906 (Ct.App.1998). "A justiciable controversy is a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute or difference of a contingent, hypothetical or abstract character." *Byrd v. Irmo High Sch.*, 321 S.C. 426, 430-31, 468 S.E.2d 861, 864 (1996). "To state a cause of action under the Declaratory Judgment Act, a party must demonstrate a justiciable controversy." *Graham v. State Farm Mut. Auto. Ins. Co.*, 319 S.C. 69, 71, 459 S.E.2d 844, 845-46 (1995) (holding that ruling was not advisory but was imperative to preserve rights and necessary to determine whether insurance coverage existed and carrier was required to be served); *see also Brown v. Wingard*, 285 S.C. 478, 330 S.E.2d 301 (1985). The concept of justiciability encompasses the doctrines of ripeness, mootness, and standing. *Jackson v. State*, 331 S.C. 486, 490 n. 2, 489 S.E.2d 915, 917 n. 2 (1997).

Holden v. Cribb, 349 S.C. 132, 137, 561 S.E.2d 634, 637 (Ct. App. 2002)(emphasis added).

The core function of litigation seeking injunctive relief, regardless of the number of parties and of claims, is to determine whether there is a likelihood that one or more specific,

named, plaintiffs will be injured by an action of one or more defendants. As the U.S. Supreme Court held in *Lewis v. Casey*, 518 U.S. 343 (1996):

> It is the role of courts to provide relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm; it is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution. In the context of the present case: It is for the courts to remedy past or imminent official interference with individual inmates' presentation of claims to the courts; it is for the political branches of the State and Federal Governments to manage prisons in such fashion that official interference with the presentation of claims will not occur.

518 U.S. at 349 (emphases added). The Supreme Court of South Carolina has cited *Lewis* with reference to standing and the need to show actual injury to the plaintiff. *Howard v. South Carolina Dept. of Corrections*, 399 S.C. 618, 633-634, 733 S.E.2d 211, 219-220 (2012)(Plaintiff's "claim is barred by the doctrine of standing as he has not demonstrated that the alleged inadequacy . . . caused *him* 'actual injury,' i.e., hindered him in pursuing his own legal claims")(emphasis in original); *Hendricks v. South Carolina Dept. of Corrections*, 385 S.C. 625, 629, 686 S.E.2d 191, 193 (2009)(same). Our Supreme Court further quoted *Lewis* to the effect that there was no "abstract, freestanding right to a law library or legal assistance" in absence of a showing of harm. *Howard, supra*, 399 S.C. at 634, 733 S.E.2d at 220. Nor is there an "abstract, freestanding right" to have regulations promoted. As the Court in *Lewis, supra,* continued:

> Standing is not dispensed in gross. If the right to complain of one administrative deficiency automatically conferred the right to complain of all administrative deficiencies, any citizen aggrieved in one respect could bring the whole structure of state administration before the courts for review. That is of course not the law. As we have said, "[n]or does a plaintiff who has been subject to injurious conduct of one kind possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which he has not been subject

518 U.S. at 349 n. 6. (Emphasis added.) Plaintiffs' claims are very similar to those condemned in *Lewis.* They seek to "bring the whole structure of state administration before the courts for review" without any showing of harm to themselves at all.[4]

b. No showing has been made of injury in fact to the individual Plaintiffs.

Plaintiffs have not cited even a single instance of how a specific individual Plaintiff has actually suffered any kind of injury in fact as a result of the claims made by Plaintiffs. There is not even a discussion of facts pertaining to any individual Plaintiff, much less an indication as to how any particular Plaintiff has been injured.

The 2007 Complaint made certain allegations about the anonymous individual Plaintiffs, but the Answer of the Defendants denied all of those allegations for lack of information, noting that the Defendants do not know the identities of the individual Plaintiffs. *See, e.g.,* Answer, Par. 17. Defendants in 2007 filed a Motion for More Definite Statement, seeking to learn the names of the anonymous Plaintiffs, but Plaintiffs successfully opposed that motion. The result was an Order of Judge Michelle Childs filed on December 14, 2007, denying the Motion for More Definite Statement. Plaintiffs have accordingly not only failed to supply the Court with facts pertaining to their particular situations, but have actually obtained an Order making it impossible for the Defendants to obtain such information.

Nor have Plaintiffs subsequently provided any more information about their individual situations other than the allegations of the Complaint, which Defendants denied for lack of

[4] Plaintiffs also place heavy reliance on the Declaratory Judgment Act, §15-53-30, but parties seeking declaratory relief still must "demonstrate a justiciable controversy," which exists when, among other things, "a concrete issue is present." *Graham v. State Farm Mut. Auto. Ins. Co.*, 319 S.C. 69, 71, 459 S.E.2d 844, 845 (1995). *See also, e.g.,* 26 C.J.S. Declaratory Judgments § 134 ("A court will not render a declaratory judgment for a complaint who lacks standing to maintain the claim for relief.").

information. Because the Defendants have denied the factual allegations of the Complaint pertaining to the individual Plaintiffs, and because there has been no subsequent showing regarding the factual situations of the individual Plaintiffs, there is no evidence whatsoever before the Court as to the facts concerning the individual Plaintiffs. As a result of this absence of a factual showing, there is nothing before the Court that shows actual injury in fact to any of the individual Plaintiffs. Plaintiffs instead rely only on alleged injury to P & A itself or on the doctrine of public interest standing, neither of which is meritorious, as shown below.

c. P & A has not shown injury in fact to itself or to any of its constituents, and therefore also lacks standing.

The absence of standing on the part of P & A has already been briefed by Defendants in their Reply Memorandum of May 28, 2010. There are two ways in which an organization such as P & A can establish standing. The first is by showing that one or more of its constituents "suffered a concrete injury." *Doe v. Stincer*, 175 F.3d 879, 887 (11th Cir. 1999). P & A has simply not even attempted to make such a showing.

The other way for P & A to establish standing is to show some harm to the entity itself. With respect to the standing of organizations or associations, the general rule in South Carolina is that "[a]n organization has standing only if it alleges that it or its members will suffer an individualized injury; a mere interest in a problem is not enough." *Beaufort Realty Co., Inc. v. Beaufort County*, 346 S.C. 298, 300-301, 551 S.E.2d 588, 589 (Ct. App. 2001)(emphasis added).

Plaintiffs' showing in this regard consists only of the Prevost Affidavit of May 11, 2010. As noted by Defendants in their May 28, 2010 Reply Memorandum, the assertion in Paragraph 8 of that affidavit that "P&A has been injured by DDSN's failure to promulgate regulations" is completely conclusory. It obviously is no substitute for the factual showing that is necessary to establish both the existence of a claim, as well as standing to sue. Plaintiffs also refer to

Paragraph 7 of the Prevost Affidavit, but the only claim in that paragraph is that it is allegedly time-consuming for P & A to search DDSN's extensive online policies and directives in order for P & A "to adequately represent its clients." Prevost Affidavit, Par. 7. This does not even remotely support Plaintiffs' claim that there is a legal duty to promulgate regulations. That duty turns on factors other than the issue of ease of use. To cite a familiar example, no one would argue that the Code of Federal Regulations is anything other than time-consuming to sift through. Moreover, the list of current DDSN Directives (Plaintiffs' Exhibit 34) clearly sets forth the content of those directives. It is absurd for P & A, which deals with DDSN regularly, to claim that the DDSN Directives are too difficult for P & A officials to understand. But even if that were the case, it still would not establish a valid claim for failure to promulgate regulations. P & A has simply not made the requisite showing of harm to itself.

d. The concept of "public importance" standing has not been applied in cases involving the need for fact-specific showings by specific individual plaintiffs.

Plaintiffs rely heavily on the "public importance" rule set forth in some South Carolina cases as a reason for permitting this case to go forward without a plaintiff who can show actual injury. The principal distinction between those cases and this one is that in most or all of them, the issue presented was primarily a legal issue, rather than one involving an intense, case-by-case, factual showing as to how specific plaintiffs are, or are not, affected by the absence of regulations in specific situations. *Cf., e.g., Sloan v. Sanford,* 357 S.C. 431, 593 S.E.2d 470 (2004) (whether Governor could hold a commission in the Air Force Reserve); *Davis v. Richland County Council,* 372 S.C. 497, 642 S.E.2d 740 (2007) (method of appointment of the members of county recreation commission); *Sloan v. Department of Transp.*, 365 S.C. 299, 618 S.E.2d 876 (2005) (interpretation of highway construction bidding statutes); *Thompson v. South Carolina*

Commission on Alcohol and Drug Abuse. 267 S.C. 463, 229 S.E.2d 718 (1976) (constitutionality of Uniform Alcohol and Intoxication Treatment Act); *Sloan v. School Dist. of Greenville County*, 342 S.C. 515, 537 S.E.2d 299 (Ct. App. 2000)(applicability of emergency exception to its competitive sealed bid procedure). Clearly, none of these cases resemble this one, which would require the review of multiple (and so far, unproven) factual situations, and the effect, or non-effect, of the absence of regulations in each situation. Such issues should be resolved only on a case-by-case basis, where the specific facts of each plaintiff's situation are fully presented.

3. In the absence of a plaintiff with standing and an actual case or controversy, it is impossible to review the merits of Plaintiffs' claims that they have been harmed by DDSN's alleged application of binding norms in the absence of regulations.

Plaintiffs' lack of a showing of injury in fact, while fatal to their claims in and of itself, also has the practical effect of making it impossible to evaluate the effect of the absence of a regulation. In other words, if, for instance, it is claimed that eligibility requirements need to be spelled out in a regulation, the validity of such a claim can only be measured in terms of whether some specific person was harmed thereby. However, there is no such person and no such showing before the Court.

While no South Carolina case has yet had occasion to decide the point, it has been held elsewhere that a party who asserts a claim of failure to promulgate regulations must show prejudice as a result of the alleged failure. *See, e.g., Goldberg v. Insurance Dept. of State of Conn.* 207 Conn. 77, 83-84, 540 A.2d 365, 368 (1988), and cases cited therein ("where as here, a party challenges the failure of an administrative agency either to adopt or publish sufficient procedural rules, that party [must] demonstrate some prejudice as a result of the agency's alleged failure").

This requirement of a showing of prejudice is simply an application of the rule that "injury in fact" must be shown. Thus, if one of the individual Plaintiffs had filed an administrative appeal based on a denial of eligibility for services, and had made a showing that there was no regulation setting forth eligibility rules, such an individual would still need to show some prejudice as a result of the alleged agency failure to promulgate regulations. Plaintiffs cite several cases in which such failures to promulgate regulations were found to have occurred. Pl. 7/31/13 Mem. at 12, 18-22. However, in those cases, the party who argued that regulations should have been promulgated was also able at least to allege some kind of specific and actual harm as a result of the agency's allegedly having adopted a binding rule without promulgating that rule in the form of a regulation. This element of some specific aspect of harm is entirely lacking in this case, which should accordingly be dismissed in its entirety.

4. In the absence of a plaintiff with standing and an actual case or controversy, it is impossible to review the merits of Plaintiffs' claim that they have been harmed by DDSN's alleged failures to promulgate regulations under §§ 44-20-220.

For the reasons set forth above, it is not even necessary to reach the merits of Plaintiffs' claims that regulations are required under § 44-20-220. (Defendants have already discussed in prior fillings the lack of merit of the claim based on § 44-20-220.) Again, there is no plaintiff before the Court who has shown uncontradicted facts demonstrating injury in fact from the absence of regulations in some specified area. Such claims can only be properly resolved in the context of a showing of injury in fact by a plaintiff. The present abstract challenge based on § 44-20-220 is lacking in substantive merit for the reasons previously shown, but in view of Plaintiffs' complete lack of standing, the merits of their claims based on that statute need not even be addressed. In fact, the merits of those claims cannot, as a practical matter, be addressed,

because the impact of DDSN's actions or inactions on the Plaintiffs is simply unknown and has not been presented to the the Court.[5]

CONCLUSION

For the foregoing reasons, Defendants respectfully submit that their motion for summary judgment should be granted, Plaintiffs' motion for summary judgment should be denied, and that this case should be dismissed with prejudice.

Respectfully submitted,

DAVIDSON & LINDEMANN, P.A.

By: /Ce—sW—oo—y

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August 2, 2013

[5] Plaintiffs' extensive exhibits, primarily consisting of either excerpts from three depositions or of copies of cases, do not advance their claims in any way. Nothing contained therein shows any harm to any Plaintiff.

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND)	
)	CASE NO.: 2007-CP-40-2187
Protection and Advocacy for the People with Disabilities, Inc., et al)	**MOTION AND ORDER INFORMATION**
Plaintiff,)	**FORM AND COVERSHEET**
vs.)	
South Carolina Department of Disabilities and Special Needs et al)	
Defendant.)	

2013 OCT 17 PM 5:03
JEANETTE W. WALKER
C.C.P. & G.S.
RICHLAND COUNTY
FILED

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☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: PLAINTIFFS' NOTICE OF AND MOTION TO ALTER, AMEND OR RECONSIDER JUDGMENT PURSUANT TO RULE 59(E), SCRCP

Estimated Time Needed: 45 minutes Court Reporter Needed: ☒ YES/☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☒ Plaintiff/☐ Defendant

October 17, 2013
Date submitted

SECTION III: Motion Fee

☐ PAID – AMOUNT: $ _____
☐ EXEMPT:
(check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter: _____
☐ Other:

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:	JUDGE CODE _____ Date: _____

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND Protection and Advocacy for People with Disabilities, Inc., et al., Plaintiffs, v. South Carolina Department of Disabilities and Special Needs, et al., Defendants.	)	IN THE COURT OF COMMON PLEAS Civil Action No.: 07-CP-402187 PLAINTIFFS' NOTICE OF AND MOTION TO ALTER, AMEND OR RECONSIDER JUDGMENT PURSUANT TO RULE 59(E), SCRCP

2013 OCT 7 PM 5:53
RICHLAND COUNTY
FILED

TO: THE HONORABLE G. THOMAS COOPER, JR.; AND WILLIAM H. DAVIDSON, II, ESQUIRE AND KENNETH P. WOODINGTON, ESQUIRE, ATTORNEYS FOR DEFENDANTS

YOU WILL PLEASE TAKE NOTICE that the Plaintiffs pursuant to SCRCP 59(e) move before The Honorable G. Thomas Cooper, Jr. at such time and place as his Honor may direct, for an Order Altering or Amending his Order dated September 24, 2013, received by Plaintiffs' counsel on Monday, October 7, 2013. See, Exhibits A and B. Specifically, the Plaintiffs seek a ruling vacating the Order and permitting further argument by the Plaintiffs and all parties to this action and other alternative relief as specified herein.

As grounds for this motion, the Plaintiffs would show the Court that:

1. The Order incorrectly holds and finds that P&A does not have standing based on its state and federal mandate to advocate for individuals with developmental disabilities. In fact, the Court incorrectly applied the rulings in *Penn. Prot. & Advocacy, Inc. v. Houston,* 136 F. Supp.2d 353, 365-67 (E.D.Pa. 2001).

In finding that P&A has no standing, the Court relied on *Penn. Prot. & Advocacy, Inc. v. Houston,* 136 F. Supp.2d 353, 365-67 (E.D.Pa. 2001). The Court is correct that this case denied associational standing to the P&A. More importantly, *Penn. Prot. & Advocacy* denied

Defendant's motion to dismiss for lack of standing and found that based on the complaint and affidavit presented PP&A had standing to sue on its own behalf.

As the *Penn. Prot. & Advocacy* court stated:

> "An organization has standing to sue on its own behalf if the organization itself can satisfy the irreducible constitutional minimum requirements and prudential concerns do not point to the need for judicial restraint. [Citing *Warth v. Seldin*, 422 U.S. 490, 511 (1975)] 'There is no question that an association may have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy.' PP&A has standing to sue on its own behalf because it sufficiently alleged an injury in fact and prudential concerns do not preclude this case from going forward. [Citing *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1995)]."

Just as in *Penn. Prot. & Advocacy*, P&A has been explicitly by the General Assembly designated as the state protection and advocacy system to implement the federal Developmental Disabilities Act, 42 U.S.C.A. §§ 15001 et seq. S.C. Code Ann. § 43-33-310. The Developmental Disabilities Act requires that each State shall have in effect a system to protect and advocate the rights of individuals with developmental disabilities and that such system shall have the authority to pursue legal, administrative, and other appropriate remedies or approaches to ensure the protection of, and advocacy for, the rights of such individuals within the State who are or who may be eligible for treatment, services, or habilitation, or who are being considered for a change in living arrangements. 42 U.S.C.A. § 15043(a)(1),(2)(i). P&A fulfills this mandate by representing individuals who encounter DDSN in all parts of its system, including applications for eligibility, investigation of abuse and neglect, and advocacy for individuals to receive services in the community, rather than in an institution.

Further, S.C. Code Ann. § 43-33-350 specifically provides:

The system has the following powers and duties:

(1) It shall protect and advocate for the rights of all developmentally disabled persons, including the requirements of Section 113 of Public Law 94-103, Section 105 of Public

Law 99-319, and Section 112 of Public Law 98-221, all as amended, and for the rights of other handicapped persons by pursuing legal, administrative, and other appropriate remedies to insure the protection of the rights of these persons.

P&A is bringing this action for exactly the reasons it was established: to protect and to advocate for the rights of individuals entitled to services. Many times P&A's representation of clients is affected by DDSN's lack of regulations. As in *Penn. Prot. & Advocacy,* Plaintiff states through the affidavit of Executive Director Gloria Prevost that, "Due to the lack of regulations within the developmental disabilities system, in order to adequately represent its clients P&A must spend time and money in attempting to figure out the 'other means' referred to by Dr. Lacy to formulate rules at DDSN; to search for the rules themselves and to determine what criteria and standards apply to each case since there is often no notice of a change in the rules; and to ensure that those standards/criteria are up-to-date, that procedures are designed to protect people with developmental disabilities, and that they are applied fairly." This language is very similar to the affidavit in *Penn. Prot. & Advocacy* that was found sufficient to confer standing on P&A. The *Penn. Prot. & Advocacy* court correctly stated that it must accept Plaintiff's factual allegations and draw all reasonable inferences in its favor, stating, "It is possible that the Defendant's alleged failings caused P & A to spend more on advocacy than it normally would, or that the organization had to divert significant resources to advocate for [other services]." *Penn. Prot. & Advocacy, Inc. v. Houston,* 136 F. Supp.2d 353, 361.

The Order also incorrectly characterizes and analyses the Plaintiffs' affidavit of Ms. Prevost. In fact, the Defendants have come forward with virtually nothing to refute Ms. Prevost's affidavit. Unlike P&A, DDSN conducted no discovery about P&A's activities on behalf of individuals with developmental disabilities, autism, traumatic brain injury or head and spinal cord injuries. Nor did they even attempt to depose the Plaintiffs in this matter.

2. The Order incorrectly holds and finds that individual Plaintiffs do not have standing to bring an action to enforce their rights under South Carolina law and under the Administrative Procedures Act (S.C. Code Ann. §§ 1-23-10, *et. seq.*) which provides for advance determination by the agency and then by the courts concerning the validity of the regulations and their applicability to particular situations so that the Plaintiffs and others can know how DDSN implements or prescribes law or policy or practice requirements of DDSN in the granting of benefits and general regulation related to its state (and federal, if any) mandates concerning certain individuals with physical and developmental disabilities without being subject to arbitrary action. The Administrative Procedures Act ("APA") was established in 1977 and requires agencies to follow uniform rulemaking procedures which give interested persons notice and an opportunity to participate in the promulgation progress. "The APA has a very broad sweep, but its definitions limits its coverage to an degree with exemptions for specific entities and particular activities. Nevertheless, the APA should be liberally construed so that its application is as comprehensive as possible." Randolph R. Lowell, SOUTH CAROLINA ADMINISTRATIVE PRACTICE AND PROCEDURE, p. 118 (2nd ed. 2008); *Schudel v. S.C. Alcoholic Beverage Control Comm'n*, 276 S.E.2d 308 (1981) (The SC Supreme Court considered this newly enacted APA and determined that it is clear from the language of the APA and its history that the APA is meant to be all inclusive.). The findings and rulings of this Court in its Order do not apply any all-inclusive or liberal application of the APA and its underlying and founding tenants in the fundamental due process of law provided by the Fourteenth Amendment of the U.S. Constitution and Article I, §3 and §22 of the South Carolina Constitution.

3. Rulings in the Order improperly apply and/or fail to consider the fundamental purpose of the South Carolina Declaratory Judgments Act in consideration of standing,

justiciability, and showing of injury. Section 15–53–20 of the South Carolina Code identifies the purpose of the Uniform Declaratory Judgments Act ("the DJ Act") and provides that courts "shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed." S.C. Code Ann. § 15–53–20 (2005); *see* Rule 57, SCRCP ("The procedure for obtaining a declaratory judgment pursuant to 15-53-10 through 15–53–140, shall be in accordance with these rules, and ... [t]he existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate."). The DJ Act is to be liberally construed and administered to achieve its intended purpose "to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations." S.C. Code Ann. § 15–53–130 (2005). However, the DJ Act does not require the courts to give purely advisory opinions as to the issues sought to be raised. *City of Columbia v. Sanders,* 231 S.C. 61, 97 S.E.2d 210 (1957). "[A]n issue that is contingent, hypothetical, or abstract is not ripe for judicial review." *Colleton County Taxpayers Ass'n v. Sch. Dist. of Colleton County,* 371 S.C. 224, 242, 638 S.E.2d 685, 694 (2006). The issues before the Court in this case are ripe, an actuality in reality, and are instances of admitted failures by the DDSN to provide and promulgate such regulations – and that is the standing that the parties presented – plus direct reference to statutes mandating that DDSN shall promulgate regulations and the admissions by DDSN representatives that they have .[1]

[1] DDSN does not have a regulation or a directive stating a policy to not promulgate regulations, nor has the issue been directly discussed by the Commission in a public setting. *See,* Lacy, 92:17- 93:17, *Exhibit 4; See,* Dr. John Vaughn Deposition (Vaughn), 160:18 – 161:8, *Exhibit 5.*

The reasoning given by Dr. Lacy for not promulgating regulations was that DDSN is not required to promulgate regulations. *See,* Lacy, 87:15-18; 89:11-12, *Exhibit 6.*

Also, Dr. Lacy testified that her experience is that it is difficult to get regulations approved by the Legislature. *See,* Lacy, 111:1-15, *Exhibit 7.*

4. The rulings in the Order fail to distinguish between the nature of a regulation and the regulation of individuals on a case-by-case, fact-specific basis when finding that the Plaintiffs have no standing, that there is no public importance in this matter to provide standing, that there is not actual controversy or case, and that there is no statutory requirement for the promulgation of regulations in the situations described in the Complaint. First, the existing case decisions of courts advise that the regulation process is preferred to be undertaken as opposed to the individual enforcement action context that each and every individual is, and would be, required to pursue. "If an agency follows guidance or rules that have not been formally promulgated as a regulation under the APA but nonetheless 'has significant impact upon the existing rights and obligations of regulated parties' and 'gives the agency no discretion in its application,' this the guidance or rule is an invalidly enacted regulation." Randolph R. Lowell, SOUTH CAROLINA ADMINISTRATIVE PRACTICE AND PROCEDURE, p. 111 (2nd ed. 2008) quoting *Sloan v. S.C. Bd. Of Physical Therapy Exam'rs*, 636 S,E.2d 598 (2006); *Home Health Serv., Inc. v. S.C. Tax Comm'n*, 440 S.E.2d 375 (1994); *Crooks v. S.C. Budget & Control Bd*, 05-ALFJ-30-0059-CC (Oct. 31, 2005) (other cites omitted). It is also results in a court established purpose contrary to the express goal and purpose of the APA, which is rulemaking or regulation by a state agency via adjudication. The nature of a regulation is to provide a set of ground rules upon which regulated

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"[T]here had been the understanding that the promulgation of regulations was not something that [DDSN] did because we used other vehicles to – to issue directives and hold people accountable to what our expectations were." *See,* Lacy Deposition, 100:1-5, Exhibit 19.

In explaining a directive Dr. Lacy stated, "It's comparable to policy and it describes certain expectations that the department has regarding people that we support, services that they receive, the responsibilities that providers have." *See,* Lacy Deposition, 25:22 – 26:1, Exhibit 21.

Dr. Lacy explained that regulations were unnecessary because "we have a vehicle that accomplishes the same thing." *See,* Lacy Deposition, 164:3-4, Exhibit 22.

All references to an "Exhibit" in this footnote are to those exhibits in Plaintiffs' Memorandum in Support of its Motion for Summary Judgment and in Opposition to the Defendant's Motion for Summary Judgment.

individuals and companies can rely, and that would have general applicability. Adjudication focuses on one person or company at a time, and then only resolves disputes between specific individuals and the state agency if the individual even knows what action might be taken. Rulemaking or regulation "affects the rights of broad classes of unspecified individuals, and adjudications have an immediate effect on specific individuals while rulemaking [or regulation] is prospective and has a definite effect on individuals only after the rule subsequently is applied...." Randolph R. Lowell, SOUTH CAROLINA ADMINISTRATIVE PRACTICE AND PROCEDURE, p. 111 (2nd ed. 2008) quoting 73 C.J.S. Public Admin, Law and Procedure, §165 (2008).

5. Rulings in the Order adversely affect the substantial constitutional rights of the Plaintiffs, especially Plaintiff Protection and Advocacy for People with Disabilities, Inc. ("Plaintiff P&A"), limiting its access to equal protection of the laws and due process of law. The construction by the Court that each of the Plaintiffs is or was free to challenge the agency action on an individual basis and that any regulations promulgated by the Defendant would not create any more right of review than already exists for the Plaintiffs. However, this ignores the fundamental guarantees of due process that the General Assembly provided in adopting the Administrative Procedures Act in order to ensure that the policies of the state agencies are properly established and known in order to have the full force and effect of law.

a. The Order adversely affects the substantial constitutional rights of Plaintiff P&A to equal protection of the laws and due process of law by dismissing with prejudice all aspects of the allegations in the Complaint so that Plaintiff P&A if forever barred and cannot ever raise such similar issues concerning the failure of promulgation of regulations by DDSN in any other matter in accordance with its federal and state legislative duty to implement the Federal

Developmental Disabilities Act, 42 U.S.C.A. §§ 15001, *et. seq.* and to "protect and advocate for the rights" of all developmentally disabled persons and for the rights of other handicapped persons "by pursuing legal, administrative, and other appropriate remedies to insure the protection of the rights by these persons." S.C. Code Ann. §§ 43-33-310 & 350. Without any warning or notice, the Court has directly, effectively and substantially hindered the ability of Plaintiff P&A to protect and advocate for and on behalf certain persons in compliance with its statutory duties and responsibilities that it "shall" carry out.

6. Rulings in the Order finding that Sections 44-20-220, 44-20-790, and 44-26-180 do not require DDSN to promulgate regulations in the subject areas of this lawsuit incorrectly state the Plaintiffs claims and incorrectly analyze these statutes and the process established by the General Assembly. The subject areas of this lawsuit do include the procedures for the Human Rights Committees and standards for research on human subjects. The critical areas of concern to the Plaintiffs are:

> That SCDDSN has never promulgated regulations regarding issues of critical concern to applicants and recipients of its services, including but not limited to eligibility for its services; appeal procedures; standards for the operation of its residential programs; procedures for its Human Rights Committees; and standards for research on human subjects.
>
> See, ¶ 7 of the Complaint.

The General Assembly defined regulation to **exclude** the internal agency procedures applicable to the agency personnel. The rulings announced in the Order by defining "operations of the department" to refer to internal functions of the agency are inconsistent with the primary and fundamental principles of the Administrative Procedures Act, Chapter 23 of Title 1. The General Assembly and the APA were not drafted and enacted to provide greater protection and rights to agency personnel than that which is provided and given to the public served by the

agency. The effect of the rulings of the Order seek to protect and provide protection only to DDSN employees (which is specifically and explicitly excluded from the definition of a regulation) and does not serve to protect the children and adults with disabilities intended to be served by DDSN. Section 1-23-10(4) defines a "regulation" as

> "each agency statement of general public applicability that implements or prescribes law or policy or practice requirements of any agency. ***Policy or guidance issued by an agency other than in a regulation does not have the force or effect of law.*** The term "regulation" includes general licensing criteria and conditions and the amendment or repeal of a prior regulation, ***but does not include descriptions of agency procedures applicable only to agency personnel;*** opinions of the Attorney General; decisions or orders in rate making, price fixing, or licensing matters; awards of money to individuals; policy statements or rules of local school boards; regulations of the National Guard; decisions, orders, or rules of the Board of Probation, Parole, and Pardon Services; orders of the supervisory or administrative agency of a penal, mental, or medical institution, in respect to the institutional supervision, custody, control, care, or treatment of inmates, prisoners, or patients; decisions of the governing board of a university, college, technical college, school, or other educational institution with regard to curriculum, qualifications for admission, dismissal and readmission, fees and charges for students, conferring degrees and diplomas, employment tenure and promotion of faculty and disciplinary proceedings; decisions of the Human Affairs Commission relating to firms or individuals; advisory opinions of agencies; and other agency actions relating only to specified individuals."

S.C. Code Ann. §1-23-10(4) (emphasis added).

7. The Order incorrectly rules and finds that "shall" does not impose any mandatory duty on DDSN. The Order also incorrectly and improperly rules that there is no statutory requirement for the promulgation of regulations by DDSN and by doing so the rules of statutory construction are misapplied or ignored. There is a statutory requirement for the promulgation of regulations by DDSN. The relevant sections of the South Carolina Code which require DDSN to promulgate regulations affecting the work of P&A and the lives of individual Plaintiffs are as follows:

> The commission shall determine the policy and promulgate regulations governing the operation of the department and the employment of professional staff and personnel. . . . The commission is authorized to promulgate regulations to carry

> out the provisions of this chapter and other laws related to mental retardation, related disabilities, head injuries, or spinal cord injuries.

S.C. Code Ann. § 44-20-220 (Supp. 2012).

> A client or his representative shall give informed consent in every case before participation in research conducted by, for, or in cooperation with the department. The department shall promulgate regulations to obtain informed consent and to protect the dignity of the individual.

S.C. Code Ann. § 44-26-180 (Supp. 2012).

The plain meaning of S.C. Code §§ 44-20-220 and 44-26-180 is that the Defendants must promulgate regulations regarding informed consent, to protect the dignity of the individual, to govern the operations of the department, and regarding employment of professional staff and personnel. "Under the rules of statutory interpretation, use of words such as 'shall' or 'must' indicates the legislature's intent to enact a mandatory requirement." *Bradley v. Doe*, 374 S.C. 622, 634, 649 S.E.2d 153, 160 (Ct. App. 2007). The Defendants have a mandatory duty to promulgate regulations because the statute uses the word "shall."

The quintessential rule of statutory construction requires the Court to determine and follow the intent of the Legislature. *SCANA Corp. v. South Carolina Department of Revenue*, 384 S.C. 388, 393, 683 S.E.2d 468, 470 (2009). Intent must first be determined by the plain meaning of the statute. "When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning." *Sloan v. S.C. Board of Physical Therapy Examiners*, 370 S.C. 452, 468, 636 S.E.2d 598, 606 (2006). Here, the General Assembly used "shall" which the Courts have determined and consistently held that "shall" means "must" and that it is mandatory. If the General Assembly has intended promulgation of regulations to be optional, it would have used something other than "shall."

Plaintiffs contend that DDSN's enabling statute requires Defendants to promulgate regulations related to operations of its department, including eligibility for its services, appeal procedures, standards for operation of its residential programs, and procedures for its Human Rights Committees. The plain meaning of the enabling statute requires Defendants follow the law and promulgate regulations.

Defendants have directly admitted that they are required to promulgate regulations related to the operations of the Department. *See,* Defendants' Answers to Plaintiffs' Requests for Admission, Response #7. However, Defendants have consistently claimed that the term operations "as used in § 44-20-220, relates only to the "*internal*" operations of the Department, and not to its mission to the outside world." *See,* Defendants' Answers to Plaintiffs' Requests for Admission, Response #5 (emphasis added). Other than this statement, the Defendants do not explain how "internal" operations are distinguished from "external" operations. It is the General Assembly who has distinguished from "internal" and "external" operations.

In interpreting the meaning of the term "operations," the Court should determine the intent of the Legislature. *SCANA Corp. v. S.C. Dept. of Revenue*, 384 S.C. 388, 393, 683 S.E.2d 468, 470 (2009). That intent should first be determined from the plain language of the statute. If the statute is ambiguous, then the Court should look to the purpose behind the statute. "All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." *State v. Sweat*, 386 S.C. 339, 350-51, 688 S.E.2d 569, 575-76 (2010)(quoting *Broadhurst v. City of Myrtle Beach Election Comm'n*, 342 S.C. 373, 380, 537 S.E.2d 543, 546 (2000)).

The Defendants' interpretation of "operations" ignores the plain meaning of the word "operations" and ignores the purpose of the enabling legislation and the APA (Section 1-23-10(4)), which does not distinguish between the "inside world" and the "outside world" at DDSN. The ordinary meaning of "operations" does not indicate merely internal operations. Because the statute does not define "operations," the ordinary, dictionary definition should be used. *Estate of Nicholson v. SCDHHS*, 377 S.C. 590, 596, 660 S.E.2d 303, 305 (2008) (citing *Lee v. Thermal Eng'g Corp.*, 352 S.C. 81, 91-92, 572 S.E.2d 298, 303-304 (Ct. App. 2002)). An operation is a method or way of operating; to operate is to function or to act. The American Heritage Dictionary 594 (4th Ed. Boston: Houghton Mifflin 2001). The function of DDSN is to interact with applicants, beneficiaries, and providers—the outside world. DDSN does not function to serve itself but to serve individuals with disabilities.

Dr. Lacy, the originator of many directives, noted that, as the Associate State Director for Policy, she has "[primary] responsibility for . . . the directives related to how the department . . . functions, responsibilities it carries out, setting forth policy . . . setting forth the service standards . . . ." Lacy, 24:13-18. In other words, she creates directives that relate to the functions or operations of DDSN. Mrs. McPherson defined operations at length in her deposition testimony. McPherson, 59-67. Essentially, she agreed that "[w]hat the director tells [staff] to do, what they do every day when they come into the office is part of the operations of the department." *Id.* at 65:7-11. Dr. Vaughn noted that eligibility and appeals were part of the operations of DDSN, but noted, like Ms. McPherson, that the Commission did not involve itself with the day-to-day operations of DDSN. Vaughn Deposition, 151:4-152:9.

The purpose behind the enabling legislation and the APA: If the term "operations" is ambiguous, then it must be interpreted in the context of the purpose of the legislation. *State v. Sweat*, 386 S.C. 339, 350-51, 688 S.E.2d 569, 575-76 (2010).

> "A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers." *Browning v. Hartvigsen*, 307 S.C. 122, 125, 414 S.E.2d 115, 117 (1992). In interpreting a statute, the language of the statute must be read in a sense which harmonizes with its subject matter and accords with its general purpose.

Sweat, 386 S.C. at 350, 688 S.E.2d at 575. The clearly stated purpose of DDSN's enabling legislation is "to assist persons with mental retardation, related disabilities, head injuries, or spinal cord injuries by providing services to enable them to participate as valued members of their communities . . . ." S.C. Code Ann. § 44-20-20 (Supp. 2011)(Purpose of Chapter). The Defendants' interpretation of the term "operations" as adopted by the Court as referring only to internal matters of DDSN is directly inconsistent with the purpose of the legislation, namely to assist individuals with disabilities to be valued members of their communities. DDSN wishes to avoid the transparency and oversight of its operations by ignoring the need for regulations that relate to its purpose, which is to help individuals live in the "outside world."

Otherwise, the statutory language in Section 44-20-220 would have no meaning or logical effect under the Order's construction. If Section 44-20-220 only required regulations for the internal operations of DDSN -- which are for agency personnel – then why would the General Assembly have separately accounted for "the employment of professional staff and personnel" in Section 44-20-220 and also in Section 1-23-10(4) that excludes agency procedures and operations related to agency personnel from the definition of "regulation." Thus, the regulations contemplated by the Section 44-20-220 exclude those setting forth the internal operations or procedures of DDSN that are applicable to agency personnel and must be the

regulations related to the **external** operations of DDSN with non-employees – which would be the Plaintiffs. Otherwise, the statute enacted by the General Assembly and now construed by the Court has a meaningless effect.

8. The Order incorrectly rules that the General Assembly intended regulations only for internal agency matters and not how the agency "relates to the outside world." *See* Defendants' Answers to Plaintiffs; Requests for Admission, ¶ 7. The argument is unsupported by the purpose of the APA, which by definition involves the public and the outside world. The definition of "regulation" specifically excludes "procedures applicable only to agency personnel." S.C. Code Ann. § 1-23-10 (4) (2005). The purpose of the APA and the reason for the regulations is to allow the agency to make statements "of general public applicability that implements or prescribes law or policy or practice requirements of [the] agency." *Id.* By definition, a regulation is public, not private; external, not internal. *See id.* Regulations are related to the way an agency relates to the "general public." For example, when an agency is establishing procedural requirements, internal procedures do not have to be promulgated as a regulation, but "procedural requirements dealing with the public, such as permit applications, filing of petitions and complaints, conduct of hearings and so forth, prescribe the practice requirements of an agency and **require formal rulemaking.**" David E. Shipley & Randolph R. Lowell, *South Carolina Administrative Practice & Procedure* p. 108 (2d ed. 2008)(emphasis added). A purely internal policy that has no effect on applicants, beneficiaries, or the public does not need to be vetted through public promulgation. The Order adopted the Defendants' definition of "operations" which ignores the purpose of both DDSN's enabling legislation (Section 44-20-220) and the APA (Section 1-23-10(4)). If there is a meaningful way to distinguish between "internal" and "external" operations, then both the APA and the DDSN

enabling legislation point to a clear public purpose and interpretation which would necessarily include how the agency relates to "the outside world."

9. The Order incorrectly holds that DDSN's failure to comply with the Administrative Procedures Act is not a matter of public interest. The Order erroneously assumes that a case-by-case determination of applicability to a specific plaintiff is necessary to finding that DDSN has acted lawlessly. On the contrary, implementation of the public policy behind the Administrative Procedures Act is of great and ongoing importance. DDSN is not the only state agency that has failed to promulgate regulations. Dr. Lacy's scofflaw attitude to promulgation demonstrates the need for a ruling that agencies may not ignore legislative mandates. [CITE] Plaintiffs are not seeking relief in "multiple, unproven fact situations." Plaintiffs are seeking the opportunity to participate in the public process established by the General Assembly to guide lawful agency actions.

DDSN administers hundreds of millions of dollars and serves thousands of South Carolinians. Its activities are at least of as much as importance as those in *Sloan v. Dept. of Transportation,* 379 S.C. 160, 666 S.E.2d 236 (2008); Baird *v. Charleston Cty.*, 333 S.C. 519, 511 S.E.2d 69 (1999); *Thompson v. South Carolina Comm'n on Alcohol & Drug Abuse,* 267 S.C. 463, 229 S.E.2d 718 (1976); and *Sloan v. School Dist. of Greenville Cty.*, 342 S.C. 515, 537 S.E.2d 299 (Ct. App. 2000).

10. The rulings in the Order impacts the Plaintiffs by apparently denying them the opportunity to be heard and for a resolution of this issue in accordance with the Administrative Procedures Act so that the harm created by DDSN is "capable of repetition yet evading review."

11. The Order incorrectly and improperly rules in failing to find that the Plaintiffs are at least entitled to judgment in their favor on the issue that DDSN failed to comply with its

General Assembly enacted mandated that DDSN **"shall promulgate regulations to obtain informed consent and to protect the dignity of the individual."** S.C. Code Ann. § 44-26-180.

> A client or his representative shall give informed consent in every case before participation in research conducted by, for, or in cooperation with the department. The department ***shall*** promulgate regulations to obtain informed consent and to protect the dignity of the individual.

S.C. Code Ann. §44-26-180 (emphasis added). It is clear and unambiguous that the DDSN must promulgate regulations related to informed consent procedures before a person participates in any research conduct by, for or on behalf of the DDSN. Defendants do not deny that DDSN is mandated to promulgate regulations "to obtain informed consent and to protect the dignity of the individual." S.C. Code Ann. § 44-26-180 (Supp. 2012); Defendants' Reply Memorandum in Support of Defendants' Motion for Summary Judgment, p. 4-5. However, Defendants **do admit that they have not promulgated a regulation on informed consent or a regulation to protect the dignity of the individual**. *See,* Defendants' Response to Plaintiffs' Request to Admit, Resp. 18, 19.[2] Instead, Defendants argue that Plaintiffs do not have standing and "the Complaint

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[2] The Plaintiffs' Requests for Admission to All Defendant asked:

"18. That the South Carolina Department of Disabilities and Special Needs has not promulgated regulations subject to review by the public or by the General Assembly in accordance with the Administrative Procedures Act which set forth policies for research on human subjects as required by S.C. Code §44-26-180.

The Defendants responded as follows:

"18. It is admitted that the Department has not promulgated regulations of the kind described in this request. However, on information and belief, the Department has rarely, if ever, conducted the kind of research referenced in S.C. Code 44-26-180. As a result, there has not yet been a need in practice for such regulations. In addition, on information and belief, none of the Plaintiffs have standing to raise this issue.'

The Plaintiffs' Requests for Admission to All Defendant asked:

"19. That the South Carolina Department of Disabilities and Special Needs has not promulgated regulations subject to review by the General Assembly or by the public in accordance with the Administrative Procedures Acts which set forth standards, procedures or process to obtain informed consent of individuals receiving service."

The Defendants responded as follows:

alleges no facts at all with reference to research on human subjects." Defendants' Memorandum in Support, p. 5. Defendants' arguments are without merit. First, the complaint does allege that the issue of "research on human subjects" is of "critical concern" to the plaintiffs. Complaint, ¶ 7. The complaint asserts that the lack of regulations will affect the health and safety of the Plaintiffs and requires P&A to expend resources and time on attempting to figure out the "other means" being used to formulate rules at DDSN. Complaint, ¶ 9, 10. The complaint also alleges that Plaintiffs have been denied an opportunity to participate in the rule-making process, as intended by the General Assembly when it enacted the APA. Complaint, ¶ 8.

12. The Order also incorrectly characterizes and analyses the Defendants' actions in this matter and provides them benefit to refute standing, injury or the existence of a valid claim when the Defendants did nothing to determine or examine standing, injury or existence of a claim other than the adopt the "don't ask and we can assert it policy." They conducted no discovery about P&A's activities on behalf of individuals with developmental disabilities, autism, traumatic brain injury or head and spinal cord injuries. Nor did DDSN ever seek or attempt to depose any of the individuals Plaintiffs or anyone from Defendant P&A. The Defendants should not be allowed to benefit from their lack of engagement or in the discovery process.

I hereby affirm that consultation with the opposing counsel regarding this Motion would serve no useful purpose.

---

19. It is admitted that the Department has not promulgated regulations of the kind described in this request, but it is denied that there is any provision of law that requires the promulgation of such regulations.

Therefore, Plaintiffs respectfully move this Court for an Order altering or amending the September 24, 2013 Order granting the Defendants' Motion for Summary Judgment and denying Plaintiffs' Motion for Summary Judgment. Specifically, the Plaintiffs seek a ruling vacating the Order and permitting further hearings and argument by the Plaintiffs and all parties to this action. In the alternative, for an Order altering or amending judgment to remove the "dismissal with prejudice restriction" for any and all Plaintiffs so that these issues may be raised as needed by individual Plaintiffs and by the Plaintiff P&A as may be needed and required in further of its statutory responsibilities, and for judgment in favor of the Plaintiffs holding that DDSN is required to promulgate regulations "to obtain informed consent and to protect the dignity of the individual" as specified by S.C. Code Ann. § 44-26-180.

Respectfully submitted,

RICHARDSON, PLOWDEN, & ROBINSON, PA

BY: _____

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803-771-4400
803-779-0016 (fax)

ATTORNEYS FOR PLAINTIFFS

Columbia, South Carolina
October 17, 2013

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2007CP4002187

Protection and Advocacy for People with Disabilities Inc
MJB
PLAINTIFF(S)

South Carolina Dept of Disabilities and Special Needs
Stanley J Butkus
DEFENDANT(S)

Submitted by: _____	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** *(CHECK REASON)*: ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other _____

☐ **ACTION STRICKEN** *(CHECK REASON)*: ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** *(CHECK APPLICABLE BOX)*: ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

RICHLAND COUNTY FILED 2013 SEP 27 AM 8:30 JEANETTE W. BRIDGE C.C. & C.R.

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.
Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge _____ **Judge Code** _____ **Date** _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20 _____ and a copy mailed first class or placed in the appropriate attorney's box on this 27 September 2013 to attorneys of record or to parties (when appearing pro se) as follows:

Kenya Carver Miller | Jo Anne Wessinger Hill | Kenneth P. Woodington

ATTORNEY(S) FOR THE PLAINTIFF(S) | ATTORNEY(S) FOR THE DEFENDANT(S)

RECEIVED OCT - 7 2013

Court Reporter _____ **Clerk of Court** Jeanette W. McBride

PLAINTIFF'S EXHIBIT A

SCRCP Form 4C (10/2011)

SCANNED

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

Protection and Advocacy for the People with Disabilities, Inc., et al.,)

Plaintiffs,)

v.)

South Carolina Department of Disabilities and Special Needs; et al.,)

Defendants.)

IN THE COURT OF COMMON PLEAS

Civil Action No. 07-CP-40-2187

ORDER

RICHLAND COUNTY
FILED
2013 SEP 24 AM 9:07
JEANETTE W. McBRIDE
C.C.P. & G.S.

This case was heard on August 6, 2013, by this Court on the parties' cross motions for summary judgment. For the reasons set forth herein, the Court grants the Motion for Summary Judgment filed by Defendants and denies Plaintiff's Motion for Summary Judgment. A review of both motions indicates that there is no genuine issue as to any material fact, and that the Defendants are entitled to judgment as a matter of law.

STATEMENT

This action was filed on April 5, 2007. Plaintiffs are a number of anonymous individuals and the eleemosynary corporation Protection and Advocacy for the People with Disabilities, Inc. ("P & A"). P & A was granted certain powers and duties by statute. S.C. Code Ann. § 43-33-310.

Plaintiffs have sought an order requiring DDSN to "promptly promulgate regulations governing the operation of the department and the employment of professional staff and personnel, and to obtain informed consent and to protect the dignity of the individual in research settings. . . ." Complaint, p. 18. The Defendants moved for summary judgment. Plaintiffs initially claimed in response that the case involves contested issues of fact and that it should not be

SCANNED

resolved on summary judgment. However, Plaintiffs eventually filed their own motion for summary judgment, agreeing that the issues in the case were solely legal issues.

The Complaint in this matter alleges a number of situations in which Plaintiffs assert that DDSN should promulgate regulations. Plaintiffs' contentions pertain to several different subjects, ranging from alleged failure to recognize certain diagnosed conditions as eligible for DDSN services, to the methods for computing rents for DDSN facilities. Plaintiffs also complain about a number of decisions in individual cases, such as claims that an individual was not eligible for autism services, or that an individual was not waitlisted for residential placement. Plaintiffs do not ask this Court to order affirmative relief in any of their cases, other than requiring DDSN to promulgate regulations. Defendants have denied the material allegations of the Complaint, and have several affirmative defenses, including lack of standing in the Plaintiffs.

CONCLUSIONS OF LAW

1. Standing of the Plaintiffs.

Defendants have asserted that neither the individual Plaintiffs nor P & A have demonstrated the necessary standing in order to pursue their claims in this action. The Court agrees, for the reasons set forth below.

a. General principles of standing and justiciability.

As shown below, neither P & A nor the individual Plaintiffs have made a showing of injury in fact to themselves. Instead, they ask for this Court, in effect, to sit as a commission of review to determine in the abstract whether DDSN needs to promulgate regulations in certain contexts. However, Plaintiffs' concept of this Court's role in this matter disregards the normal principles of justiciability, standing, and actual injury in fact to the plaintiffs in litigation, which must be shown before relief will be granted by a court.

GR ✱ 2

The law in South Carolina on issues of justiciability and standing has been summarized by the Court of Appeals as follows:

> A threshold inquiry for any court is a determination of justiciability, *i.e.*, whether the litigation presents an active case or controversy." *Lennon v. S.C. Coastal Council*, 330 S.C. 414, 415, 498 S.E.2d 906, 906 (Ct.App.1998). "A justiciable controversy is a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute or difference of a contingent, hypothetical or abstract character." *Byrd v. Irmo High Sch.*, 321 S.C. 426, 430-31, 468 S.E.2d 861, 864 (1996). "To state a cause of action under the Declaratory Judgment Act, a party must demonstrate a justiciable controversy." *Graham v. State Farm Mut. Auto. Ins. Co.*, 319 S.C. 69, 71, 459 S.E.2d 844, 845-46 (1995) (holding that ruling was not advisory but was imperative to preserve rights and necessary to determine whether insurance coverage existed and carrier was required to be served); *see also Brown v. Wingard*, 285 S.C. 478, 330 S.E.2d 301 (1985). The concept of justiciability encompasses the doctrines of ripeness, mootness, and standing. *Jackson v. State*, 331 S.C. 486, 490 n. 2, 489 S.E.2d 915, 917 n. 2 (1997).

Holden v. Cribb, 349 S.C. 132, 137, 561 S.E.2d 634, 637 (Ct. App. 2002)(emphasis added).

The core function of litigation seeking injunctive relief, regardless of the number of parties and of claims, is to determine whether there is a likelihood that one or more specific, named, plaintiffs will be injured by an action of one or more defendants. As the U.S. Supreme Court held in *Lewis v. Casey*, 518 U.S. 343 (1996):

> It is the role of courts to provide relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm; it is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution. In the context of the present case: It is for the courts to remedy past or imminent official interference with individual inmates' presentation of claims to the courts; it is for the political branches of the State and Federal Governments to manage prisons in such fashion that official interference with the presentation of claims will not occur.

518 U.S. at 349 (emphases added).

The Supreme Court of South Carolina has cited *Lewis* with reference to standing and the need to show actual injury to the plaintiff. *Howard v. South Carolina Dept. of Corrections*, 399 S.C. 618, 633-634, 733 S.E.2d 211, 219-220 (2012)(Plaintiff's "claim is barred by the doctrine of standing as he has not demonstrated that the alleged inadequacy . . . caused *him* 'actual injury,' i.e., hindered him in pursuing his own legal claims")(emphasis in original); *Hendricks v. South Carolina Dept. of Corrections*, 385 S.C. 625, 629, 686 S.E.2d 191, 193 (2009)(same). Our Supreme Court further quoted *Lewis* to the effect that there was no "abstract, freestanding right to a law library or legal assistance" in absence of a showing of harm. *Howard, supra,* 399 S.C. at 634, 733 S.E.2d at 220. Nor is there an "abstract, freestanding right" to have regulations promoted. As the Court in *Lewis, supra,* continued:

> Standing is not dispensed in gross. If the right to complain of one administrative deficiency automatically conferred the right to complain of all administrative deficiencies, any citizen aggrieved in one respect could bring the whole structure of state administration before the courts for review. That is of course not the law. As we have said, "[n]or does a plaintiff who has been subject to injurious conduct of one kind possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which he has not been subject

518 U.S. at 349 n. 6. (Emphasis added.) Plaintiffs' claims are very similar to those condemned in *Lewis*. They seek to "bring the whole structure of state administration before the courts for review" without any showing of harm to themselves at all.[1]

[1] Plaintiffs also place heavy reliance on the Declaratory Judgment Act, §15-53-30, but parties seeking declaratory relief still must "demonstrate a justiciable controversy," which exists when, among other things, "a concrete issue is present." *Graham v. State Farm Mut. Auto. Ins. Co.*, 319 S.C. 69, 71, 459 S.E.2d 844, 845 (1995). *See also, e.g.*, 26 C.J.S. Declaratory Judgments § 134 ("A court will not render a declaratory judgment for a complaint who lacks standing to maintain the claim for relief.").

b. Absence of a showing of injury in fact to the individual Plaintiffs.

Plaintiffs have not cited even a single instance of how a specific individual Plaintiff has actually suffered any kind of injury in fact as a result of the claims set forth in the Complaint. There is not even a discussion of facts pertaining to any individual Plaintiff, much less an indication as to how any particular Plaintiff has been injured.

The 2007 Complaint made certain allegations about the anonymous individual Plaintiffs, but the Answer of the Defendants denied all of those allegations for lack of information, noting that the Defendants did not know the identities of the individual Plaintiffs. *See, e.g.*, Answer, Par. 17. Defendants in 2007 filed a Motion for More Definite Statement, seeking to learn the names of the anonymous Plaintiffs, but Plaintiffs successfully opposed that motion. The result was an Order of Judge Michelle Childs filed on December 14, 2007, denying the Motion for More Definite Statement. Plaintiffs have accordingly not only failed to supply the Court with facts pertaining to their particular situations, but have actually obtained an Order making it impossible for the Defendants to obtain any definite information about any of the individual Plaintiffs.

Nor have Plaintiffs subsequently provided any more information about their individual situations other than the allegations of the Complaint, which Defendants denied for lack of information. Because the Defendants have denied the factual allegations of the Complaint pertaining to the individual Plaintiffs, and because there has been no subsequent showing regarding the factual situations of the individual Plaintiffs, there is no evidence whatsoever before the Court as to the facts concerning the individual Plaintiffs. As a result of this absence of a factual showing, there is nothing before the Court that shows actual injury in fact to any of the individual Plaintiffs.

c. Absence of a showing of injury in fact to P & A or to any of its constituents.

There are two ways in which an organization such as P & A can establish standing. The first is by showing that one or more of its constituents "suffered a concrete injury." Thus, for instance, in *Doe v. Stincer*, 175 F.3d 879 (11th Cir. 1999), an advocacy group similar to P & A was held to have no standing to argue about an agency's procedures in the absence of

> any evidence that any of the Advocacy Center's constituents have been denied access to mental health records based on the Florida statute at issue here. Without such allegations, the Advocacy Center cannot show that any of its clients suffered a concrete injury that is traceable to the challenged statute and could be redressed by a favorable decision in this action-as it must to establish standing. . . .

175 F.3d at 887. *See also, Tenn. Prot. & Advocacy, Inc. v. Bd. of Educ.*, 24 F.Supp.2d 808, 816 (M.D.Tenn.1998)(holding that the protection and advocacy group did not establish that it had standing to sue where it failed to name specific individuals who had suffered concrete harm); *Pa. Prot. & Advocacy, Inc. v. Houston*, 136 F.Supp.2d 353, 365-67 (E.D.Pa.2001)(denying standing to the protection and advocacy system because it had failed to "identify a specific constituent who is being harmed by the [d]efendant's actions"). 175 F.3d 879, 887 (11th Cir. 1999). In the present case, P & A has simply not even attempted to make such a showing. As already noted, there is nothing in the record which shows injury to any individual Plaintiff, so this method of establishing standing is unavailing to P & A..

The other way for P & A to establish standing is to show some harm to the entity itself. With respect to the standing of organizations or associations, the general rule in South Carolina is that "[a]n organization has standing only if it alleges that it or its members will suffer an individualized injury; a mere interest in a problem is not enough." *Beaufort Realty Co., Inc. v. Beaufort County*, 346 S.C. 298, 300-301, 551 S.E.2d 588, 589 (Ct. App. 2001)(emphasis added).

Plaintiffs' showing in this regard consists only of the Prevost Affidavit of May 11, 2010. However, the assertion in Paragraph 8 of that affidavit that "P&A has been injured by DDSN's failure to promulgate regulations" is completely conclusory. It obviously is no substitute for the factual showing that is necessary to establish both the existence of a claim, as well as standing to sue. Plaintiffs also have referred the Court to Paragraph 7 of the Prevost Affidavit, but the only claim in that paragraph is that it is allegedly time-consuming for P & A to search DDSN's extensive online policies and directives in order for P & A "to adequately represent its clients." Prevost Affidavit, Par. 7. This does not support Plaintiffs' claim that there is a legal duty to promulgate regulations. That duty turns on factors other than the issue of ease of use. To cite a familiar example, no one would argue that the Code of Federal Regulations is anything other than time-consuming to sift through. In contrast, the list of current DDSN Directives (Plaintiffs' Exhibit 34) clearly sets forth the content of those directives. P & A, which deals with DDSN regularly, cannot validly claim that the DDSN Directives are too difficult for P & A officials to understand. But even if that were the case, it still would not establish a valid claim for failure to promulgate regulations. P & A has simply not made the requisite showing of harm to itself.

d. "Public importance" standing.

Plaintiffs rely heavily on the "public importance" rule set forth in some South Carolina cases as a reason for permitting this case to go forward without a plaintiff who can show actual injury. The principal distinction between those cases and this one is that in most or all of them, the issue presented was primarily a legal issue, rather than one involving an intense, case-by-case, factual showing as to how specific plaintiffs are, or are not, affected by the absence of regulations in specific situations. *Cf., e.g., Sloan v. Sanford*, 357 S.C. 431, 593 S.E.2d 470 (2004) (whether Governor could hold a commission in the Air Force Reserve); *Davis v. Richland*

County Council, 372 S.C. 497, 642 S.E.2d 740 (2007) (method of appointment of the members of county recreation commission); *Sloan v. Department of Transp.*, 365 S.C. 299, 618 S.E.2d 876 (2005) (interpretation of highway construction bidding statutes); *Thompson v. South Carolina Commission on Alcohol and Drug Abuse*. 267 S.C. 463, 229 S.E.2d 718 (1976) (constitutionality of Uniform Alcohol and Intoxication Treatment Act); *Sloan v. School Dist. of Greenville County*, 342 S.C. 515, 537 S.E.2d 299 (Ct. App. 2000)(applicability of emergency exception to its competitive sealed bid procedure). Clearly, none of these cases resemble this one, which would require the review of multiple, unproven factual situations, and the effect, or non-effect, of the absence of regulations in each situation. Such issues should be resolved only on a case-by-case basis, where the specific facts of each plaintiff's situation are fully presented.

2. Effect of the absence of a plaintiff with standing and an actual case or controversy.

Plaintiffs' lack of a showing of injury in fact, while fatal to their claims in and of itself, also has the practical effect of making it impossible to evaluate the effect of the absence of a regulation. In other words, if, for instance, it is claimed that eligibility requirements need to be spelled out in a regulation, the validity of such a claim can only be measured in terms of whether some specific person was harmed thereby. However, there is no such person and no such showing before the Court.

While no South Carolina case has yet had occasion to decide the point, it has been held elsewhere that a party who asserts a claim of failure to promulgate regulations must show prejudice as a result of the alleged failure. *See, e.g., Goldberg v. Insurance Dept. of State of Conn.* 207 Conn. 77, 83-84, 540 A.2d 365, 368 (1988), and cases cited therein ("where as here, a party challenges the failure of an administrative agency either to adopt or publish sufficient

procedural rules, that party [must] demonstrate some prejudice as a result of the agency's alleged failure").

This requirement of a showing of prejudice is simply an application of the rule that "injury in fact" must be shown. Thus, if one of the individual Plaintiffs had filed an administrative appeal based on a denial of eligibility for services, and had made a showing that there was no regulation setting forth eligibility rules, such an individual would still need to show some prejudice as a result of the alleged agency failure to promulgate regulations. Plaintiffs cite several cases in which such failures to promulgate regulations were found to have occurred. Pl. 7/31/13 Mem. at 12, 18-22. However, in those cases, the party who argued that regulations should have been promulgated was also able at least to allege some kind of specific and actual harm as a result of the agency's allegedly having adopted a binding rule without promulgating that rule in the form of a regulation. This element of some specific aspect of harm is entirely lacking in this case, which must accordingly be dismissed in its entirety.[2]

3. Merits of Plaintiffs' claims.

Even if some or all Plaintiffs are deemed to have standing, their claims lack substantive merit, for the reasons set forth below.

a. Absence of a statutory requirement for the promulgation of regulations in the situations described in the Complaint.

As a general rule, any duty to promulgate regulations must be found in some statutory directive. Absent such a directive, the duty to promulgate regulations simply does not exist. Essentially the same principles are followed in both state and federal cases dealing with this

[2] A further reason for there to be a plaintiff with standing is that the specific facts of each individual's situation would need to be examined in order to determine whether such individual's case has become moot at some point since 2007, when this case was filed.

subject. A good starting point for the inquiry, therefore, is *National Small Shipments Traffic Conference, Inc. v. I.C.C.*, 725 F.2d 1442, 1447 (D.C. Cir. 1984), which holds that

> It is hornbook administrative law that the choice of proceeding by individual adjudication or general rulemaking lies largely within the agency's discretion. *SEC v. Chenery*, 332 U.S. 194 (1947).

In all of the individual instances cited in the Complaint, the allegedly-aggrieved party is (or was) free to challenge the agency action of which the party complains, if other provisions of law require the agency to hold a hearing, or if other provisions of law permit judicial review of such actions. Such situations would present instances of "individual adjudication" as mentioned in the case above.[3] In the absence of provisions creating a right to a hearing or to judicial review, Plaintiffs would gain nothing by the addition of regulations, because those regulations could not create a right to any more review than already exists.

Another example of a statement of the general rule is found in *Pulido v. Heckler*, 758 F.2d 503, 506 (10th Cir. 1985):

> [A]s a general rule, an administrative agency is not required to promulgate detailed rules interpreting every statutory provision that may be relevant to its actions. *See American Power & Light Co. v. SEC*, 329 U.S. 90, 67 S.Ct. 133, 91 L.Ed. 103 (1946); *SEC v. Chenery Corp.*, 332 U.S. 194, 67 S.Ct. 1575, 91 L.Ed. 1995 (1947). A statute may, however, impose a duty to do so.

(Emphasis added.) Plaintiffs apparently do not allege otherwise. Instead, they allege that DDSN "has refused to adhere to its statutory duty to promulgate regulations." Complaint, Par. 45. The Complaint cites three statutes which Plaintiffs allege to confer a duty on DDSN to promulgate

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[3] It has long been held that there is no constitutional duty to promulgate regulations. *American Power & Light Co. v. Securities and Exchange Commission*, 329 U.S. 90, 106 (1946)("[n]or is there any constitutional requirement that the legislative standards be translated by the Commission into formal and detailed rules of thumb prior to their application to a particular case. If that agency wishes to proceed by the more flexible case-by-case method, the Constitution offers no obstacle").

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regulations in the areas mentioned by Plaintiffs. Those three statutes are quoted in pertinent part below:

> **SECTION 44-20-220. Duties of Commission; per diem; appointment of Director of Disabilities and Special Needs; advisory committees.**
>
> The commission shall determine the policy and promulgate regulations governing the operation of the department and the employment of professional staff and personnel. The members of the commission shall receive subsistence, mileage, and per diem as may be provided by law for members of state boards, committees, and commissions. The commission shall appoint and in its discretion remove a South Carolina Director of Disabilities and Special Needs who is the chief executive officer of the department. The commission may appoint advisory committees it considers necessary to assist in the effective conduct of its responsibilities. The commission may educate the public and state and local officials as to the need for the funding, development, and coordination of services for persons with mental retardation, related disabilities, head injuries, and spinal cord injuries and promote the best interest of persons with mental retardation, related disabilities, head injuries, and spinal cord injuries. The commission is authorized to promulgate regulations to carry out the provisions of this chapter and other laws related to mental retardation, related disabilities, head injuries, or spinal cord injuries. In promulgating these regulations, the commission must consult with the advisory committee of the division for which the regulations shall apply.
>
> **SECTION 44-20-790. Promulgation of regulations governing hearings.**
>
> The procedures governing hearings authorized by "Notice of Deficiencies . . ." must be in accordance with regulations promulgated by the department. The director may appoint a review team, including consumers, to assist in the collection of information pertinent to the hearing.[4]

[4] The language "Notice of Deficiencies . . ." is set forth above exactly as it appears in the statutes. It pertains to written notices given by DDSN to governing boards of programs or operators or licensees of programs or facilities. § 44-20-780.

> **SECTION 44-26-180. Informed consent required for participation in research; promulgation of regulations.**
>
> A client or his representative shall give informed consent in every case before participation in research conducted by, for, or in cooperation with the department. The department shall promulgate regulations to obtain informed consent and to protect the dignity of the individual.

An examination of each one of these statutes reveals that none of them require DDSN to promulgate regulations in the subject areas of this lawsuit, that is, eligibility for services, appeal procedures, standards for operation of residential programs, procedures for its Human Rights Committees, and standards for research on human subjects.[5] Complaint, Paragraphs 7, 38.

Starting with the last-mentioned statute, Section 44-26-180, which pertains to informed consent before research may be performed, there is nothing in the Complaint to indicate that any individual Plaintiff has ever been the subject of "research conducted by, for, or in cooperation with the department." § 44-26-180. Indeed, the Complaint alleges no facts at all with reference to research on human subjects. As a result, in addition to lacking standing generally, Plaintiffs clearly lack standing to complain with regard to § 44-26-180.

Another of the three statutes, § 44-20-790, pertains to regulations governing hearings that may be requested after notices of deficiencies in a program or operation. This section relates back to the preceding section, § 44-20-790, which establishes a right to written notice and a hearing before a program operator's license is suspended, denied or revoked. None of the Plaintiffs, including P & A, is a program operator or licensee, so there is obviously no standing in any of them to complain of alleged absence of regulations under § 44-20-790.[6] To put it

[5] There is nothing in the Complaint that would suggest that Plaintiffs, or any of them, have standing to complain about alleged lack of regulations pertaining to research on human subjects.

[6] Operators and licensees are not disabled or handicapped persons for whom P & A may advocate. *See* § 43-33-35.

differently, that section does not create a duty to promulgate regulations in any of the subject areas of this lawsuit listed in Paragraphs 7 and 38 of the Complaint.[7]

Finally, Plaintiffs cite § 44-20-220. That section contains two provisions for the promulgation of regulations. The first is of limited application. It provides that the DDSN Commission

> shall determine the policy and promulgate regulations governing the operation of the department and the employment of professional staff and personnel;

(Emphasis added). Plaintiffs allege that this paragraph imposes a mandatory duty because of the use of the word "shall." Complaint, Par. 39. Even assuming, however, that this provision is mandatory as to its subject area, Plaintiffs fail to highlight that subject area, which is limited to "the operation of the department and the employment of professional staff and personnel." In plain and ordinary parlance, a phrase such as "the operation of the department" refers to the internal functions of the agency, rather than its actions in the performance of its mission to the outside world. This meaning is confirmed by the next phrase in the statute, which is "and the employment of professional staff and personnel." This is likewise a phrase that refers to the internal operations of the agency. None of the Plaintiffs alleges that they are aggrieved by any internal operation of the agency, as would be the case, for instance, if one of the plaintiffs had been an employee complaining of wrongful discharge or other agency actions involving his employment.

On the other hand, the same code section also deals with the agency's mission to the outside world, that is, "carry[ing] out the provisions of this chapter and other laws related to

[7] Those areas, again, are eligibility for services, appeal procedures, standards for operation of residential programs (as opposed to procedures for denying or terminating program licenses), procedures for its Human Rights Committees, and standards for research on human subjects.

GR 03

mental retardation, related disabilities, head injuries, or spinal cord injuries. In promulgating these regulations. . . ." § 44-20-220. In that situation, the statute does not provide that the agency "shall" promulgate regulations, but instead it provides that the agency "is authorized to" promulgate regulations. The full sentence, which Plaintiffs do not quote in the Complaint, provides that

> The commission is authorized to promulgate regulations to carry out the provisions of this chapter and other laws related to mental retardation, related disabilities, head injuries, or spinal cord injuries.

This sentence of the statute undermines Plaintiff's allegation that the statute imposes mandatory duties on the agency to promulgate regulations with respect to most aspects of its mission, that is, the implementation of "[that] chapter and other laws related to mental retardation, related disabilities, head injuries, or spinal cord injuries."

Clearly, the term "is authorized to," as used in § 44-20-220, does not create a mandatory duty to promulgate regulations. In *Scalise v. Thornburgh*, 891 F.2d 640 (7th Cir. 1989), the court construed the words "[t]he Attorney General is authorized ... to make regulations for the proper implementation of such treaties in accordance with this chapter. . ." Rejecting a claim that this language created a duty to promulgate regulations, the court held:

> We find no merit in the argument that this language by itself imposes a mandatory duty to issue regulations. The language does not provide that the Attorney General "shall" issue regulations, it merely states that he is authorized to do so.

891 F.2d at 644. The court added in a footnote that "Congress unquestionably knows how to and is capable of imposing mandatory obligations on Executive branch officials to issue regulations." *Id.*, n.4. *Accord, Bagguley v. Bush*, 953 F.2d 660, 662 (D.C. Cir. 1991)(same); *Heckler v. Chaney*, 470 U.S. 821 (1985)(language "[t]he Secretary is authorized to conduct examinations and investigations" held permissive rather than mandatory). These cases, in addition to the plain

and ordinary meaning of the statute itself, leave no doubt that DDSN has been vested with discretion, rather than a mandatory duty, to promulgate regulations in furtherance of its mission to provide programs and services "related to mental retardation, related disabilities, head injuries, or spinal cord injuries."

The Supreme Court of South Carolina has likewise recognized the distinction between statutes mandating the promulgation of regulations and other statutes merely permitting regulations to be promulgated. In *Captain's Quarters Motor Inn, Inc., v. South Carolina Coastal Council*, 306 S.C. 488, 413 S.E.2d 13 (1991), the Court held that the Coastal Council's enabling statute, by providing that "[t]he Council shall . . . publish final rules and regulations," imposed a mandatory duty. 306 S.C. at 491, 413 S.E.2d 13, at 14 (emphasis added). On the other hand, the enabling act for the Department of Natural Resources provided only that that agency "may promulgate regulations to effectuate the provisions of this chapter." (Emphasis added). Accordingly, the Court in *Edisto Aquaculture Corp. v. South Carolina Wildlife and Marine Resources Dept.*, 311 S.C. 37, 426 S.E.2d 753 (1993), held that DNR was under no mandatory duty to promulgate regulations:

> The simple answer here is that the [DNR] Commission may promulgate regulations, since there is no mandatory language in § 50-16-50. This difference in underlying statutes allows the [DNR] Commission a level of discretion that the Coastal Council does not have.

311 S.C. at 40, 426 S.E.2d at 755. The DDSN statutes contain the same absence of mandatory language in connection with the subject areas of which Plaintiffs complain.

Finally, while the Complaint does not appear to assert that the Administrative Procedures Act, in of itself, creates a mandate to promulgate regulations, such an argument would be fruitless in any event. There is nothing at all in the APA that addresses whether a regulation should be promulgated. Instead, that Act's purpose is to provide for procedures and processes for

the promulgation of regulations that are required by some other provision of law, or of regulations that an agency elects, in its discretion, to promulgate. *South Carolina Ambulatory Surgery Center Ass'n v. South Carolina Workers' Compensation Com'n.*, 389 S.C. 380, 390, 699 S.E.2d 146, 152 (2010)(APA, § 1-23-110, "merely provides for the procedures that must be followed whenever a regulation is otherwise mandated"). *See also, Consolidated Aluminum Corp. v. Tennessee Valley Authority*, 462 F. Supp. 464, 475 (M.D. Tenn. 1978)(while the federal APA requires an agency to follow certain steps in the process of promulgating regulations; "[the APA] does not . . . require an agency to adopt such [regulations]; and a court cannot create duties in this regard which are not imposed by statute"). The reasoning of these cases, and the nature of the APA in general, preclude any argument by Plaintiffs that the APA imposes a mandatory duty on an agency to promulgate regulations.

b. Plaintiffs' contentions regarding alleged "binding norms."

The Complaint in this case was filed in April 2007, over six years ago. The legal claim asserted in the Complaint was that the Defendants had failed to perform statutory duties set forth in the statutes specific to DDSN. Complaint, Paragraphs 39-41 (citing §§ 44-20-220, 44-26-180, and 44-20-790).[8] Reference was made to the APA as well, but no specific section of the APA was cited.

Also absent from the Complaint was any suggestion that Plaintiffs were claiming that DDSN had improperly established "binding norms." That issue was first mentioned, in a very limited context, in Plaintiffs' May 13, 2010 Memorandum in Opposition to Defendants' Motion for Summary Judgment, pp. 19-21. However, the issue was mentioned only in connection with one fact situation, which turned out to be incorrect in fact. (Plaintiffs had argued that DDSN had

[8] The claim based on § 44-20-790 appears to have been abandoned.

determined that it would not provide services to persons with Asperger's Syndrome. *Id.* at 23. As Plaintiffs now recognize, Pl. July 31, 2013 Memorandum at 26, that statement is not factually correct: DDSN does in fact provide such services.)[9]

The response of the Defendants in 2010 was first, to mention that the claim relating to Asperger's Syndrome was factually incorrect, as noted above, second, to note that the "binding norm" theory had not been pled, and third, to note that Plaintiffs had not presented the Court with any specific facts indicating that a genuine issue of fact existed on this point. Defendants' Reply Memorandum, May 28, 2010, at 6-7.

At present, more than three years later, Plaintiffs have never sought to amend their Complaint to raise in proper fashion the "binding norm" issue. Instead, their July 31, 2013, Memorandum has expanded that unpled claim. Pl. 7/31/13 Mem. at 12-13, 18-22. As a result, this claim should not be considered at this late date.

Even if the "binding norm" argument is considered, however, Plaintiffs cannot prevail on it, because they have failed to show how they have been injured in fact by the absence of regulations, the point on which their claim is based. In order to determine whether any Plaintiff was injured by the alleged imposition of a binding norm without a regulation, it would be necessary for such an individual to show the specific agency action taken, the harm to that

[9] It is noteworthy that Plaintiffs did not argue in 2010, as they do now, that the "binding norm" theory should entitle them to summary judgment. Instead, they argued that "Whether the agency has established a binding norm with regard to some of its policies is a question of fact." *Id.* at 23. (That claim has subsequently been silently abandoned. Plaintiffs now argue that there is no issue of fact.)

individual as a result, and the extent, if any, to which binding effect was given to an unpromulgated statement by the agency. None of these are present.[10]

CONCLUSION

For the foregoing reasons, the Court concludes that Plaintiff's Motion for Summary Judgment should be denied, Defendants' Motion for Summary Judgment should be granted, and that this action should be, and hereby is, dismissed with prejudice in all respects.

AND IT IS SO ORDERED.

G. Thomas Cooper, Jr.
Circuit Court Judge
Fifth Judicial Circuit

Columbia, South Carolina

September 25, 2013

[10] Even if P & A had been held to have standing to raise some of its claims, P & A would not have standing to raise the "binding norm" claim, again, because of the lack of specific facts that would the nature or extent of any alleged injury.

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

AFFIDAVIT OF
C. JO ANNE WESSINGER HILL

PERSONALLY APPEARED BEFORE ME, the undersigned C. Jo Anne Wessinger Hill, who being first duly sworn by an officer authorized to administer oaths, states the following facts which Affiant knows to be true of her own knowledge, except as to those matters stated on information and belief and as to those matters, Affiant believes them to be true.

1. I am over the age of 18 and competent to swear to the matters contained herein.

2. My name is C. Jo Anne Wessinger Hill and I am an attorney (shareholder) with the law firm of Richardson Plowden & Robinson, PA and have been with this law firm for more than fifteen (15) years.

3. On the morning of Monday, October 7, 2013, I received a copy of the Order dated September 24, 2013 by Judge G. Thomas Cooper, Jr, that denied the Plaintiffs' Motion for Summary Judgment and granted the cross-Motion for Summary Judgment of the Defendants in the morning mail between 11:00 a.m. and 11:30 a.m.

FURTHER AFFIANT SAYETH NOT THIS 17th DAY OF OCTOBER, 2013.

C. Jo Anne Wessinger Hill
Attorney
RICHARDSON PLOWDEN & ROBINSON, P.A.

SWORN TO AND SUBSCRIBED
before me this 17th day of OCTOBER, 2013.

Sonya Hancock
Notary Public for the State of South Carolina
My Commission expires 9/5/2022

PLAINTIFF'S EXHIBIT B

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

AFFIDAVIT OF
C. JO ANNE WESSINGER HILL

PERSONALLY APPEARED BEFORE ME, the undersigned C. Jo Anne Wessinger Hill, who being first duly sworn by an officer authorized to administer oaths, states the following facts which Affiant knows to be true of her own knowledge, except as to those matters stated on information and belief and as to those matters, Affiant believes them to be true.

1. I am over the age of 18 and competent to swear to the matters contained herein.

2. My name is C. Jo Anne Wessinger Hill and I am an attorney (shareholder) with the law firm of Richardson Plowden & Robinson, PA and have been with this law firm for more than fifteen (15) years.

3. That it was my understanding and belief that the attached affidavit of Larrye Hyde had been filed in the matter of Protection and Advocacy for People with Disabilities, Inc. et al. v. S.C. Department of Disabilities and Special Needs et al., Civil Action No. 2007-CP-40-02187, along with other affidavits related to the Plaintiffs, and that it was presumed to be in the underlying record. See, Exhibit 1.

4. That it is my understanding and belief that upon recent examination of the record, the affidavits, including the Hyde affidavit, do not appear to be in the record and that something had to happen outside the custody and control of counsel.

5. That it is my understanding and belief that the attached Hyde affidavit and other similar affidavits were forwarded by US Mail for filing years ago in the fall or last quarter of 2010.

6. That it was the intent and belief that the attached Hyde affidavit had been filed and was part of the underlying record.

FURTHER AFFIANT SAYETH NOT THIS 17th DAY OF OCTOBER, 2013.

C. Jo Anne Wessinger Hill
Attorney
RICHARDSON PLOWDEN & ROBINSON, P.A.

SWORN TO AND SUBSCRIBED
before me this 17th day of OCTOBER, 2013.

Sonya Haucock
Notary Public for the State of South Carolina
My Commission expires 9/5/2022

PLAINTIFF'S EXHIBIT C

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)))	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
Protection and Advocacy for the People with Disabilities, Inc., et al., Plaintiffs, v. South Carolina Department of Disabilities and Special Needs, et al., Defendants.	)	C/A No.: 2007-CP-40-2187 **AFFIDAVIT OF LARRYE HYDE**

PERSONALLY APPEARED before me, Larrye Hyde, who first being duly sworn, deposes and says that:

1. My name is Larrye Hyde, and I reside at 5932 Main Street in Ravenel, South Carolina. I am over 18 years of age.
2. I also have a granddaughter and adopted daughter, who is 14 years old. (Hereinafter "daughter"). She has a full scale IQ of 63 and has been denied services from DDSN three times.
3. My daughter's current Axis II diagnosis is Cognitive Function in the Mildly Retarded Range. She also has an Axis I diagnosis of Bipolar Disorder, Severely Mood Dysregulated Type, Multi-dimensionally Impaired and generalized anxiety disorder. Her global assessment of function, or GAF score, is 30 out of 100.
4. My daughter has trouble with separation anxiety, rages, irritability, mood swings, distractibility, hyperactivity, impulsivity, restlessness, silliness, issues with her diet, depression, lethargy, low self-esteem, social anxiety, oversensitivity, night



terrors, short term memory, disorganization, manipulative behavior, paranoia, and hallucinations. Because much of her background is unknown to us, we have little information as to the cause of these problems. More recently, she has developed Parkinson-like symptoms where the muscles in her arms and legs are rigid and she has trouble swallowing.

5. My daughter does not know how to make a telephone call, how to make her breakfast, how to wash clothes, how to get out of the house in an emergency. She knows her telephone number sometimes, but not her address. If she were lost, she would not know what to do. If she were frightened by her surroundings, she would most probably act out.
6. The first time I applied for DDSN services, our initial application, was the summer of 2009. I received a response that did not indicate why services were denied or what I needed to do to appeal. (Attachment 1) I called and asked how to appeal, and I was told that I could only appeal if I had new information and that my case had already been closed. When I was able to get more information on my daughter, I applied a second time with the new information. I did not receive a written response, but I was told that my daughter had been denied services.
7. This spring, Dr. Randolph Waid was able to complete a neuropsychological consultation evaluating my daughter and noted she had a WISC IV Full Scale IQ of 63, placing her at the first percentile. I applied for services again with this new report and my daughter was turned down. (Attachment 2). Again, when I called to ask about appealing, I was told that there was no point because she was not eligible and that her case had already been closed.

8. Because we were turned down for services by DDSN, presumably because my daughter's functioning is too high, we have applied for services from other agencies and entities. However, receiving services from other entities has been difficult because her functioning is too low to benefit from those services. For example, her processing ability is so poor that it is very difficult for her to benefit from therapy. Our daughter seems to fall through the cracks: IQ too high for DDSN, but too low for others.

9. In addition to DDSN denying services, my daughter has also been denied services from the following entities: MUSC Institute of Psychiatry, Palmetto Lowcountry Behavioral Health, and Continuum of Care. Each of these denials has been related to my daughter's low cognitive functioning and essentially an assumption that she will not show improvement through psychiatric treatment. However, we contest this assumption, and we are hopeful.

10. Even though Continuum of Care initially indicated that our daughter was too low functioning to benefit from their services, with help from P&A we have been able to become a client of Continuum of Care. Two P&A advocates have helped us and have attended multiple meetings, traveling from Columbia to attend.

11. Much of the treatment our daughter has been able to receive has been psychiatric treatment, which has had only limited success because of our daughter's difficulty understanding and applying what she learns in therapy.

12. Both my husband and I have nursing backgrounds. We have a biological child who has a developmental disorder and receives services from DDSN. In spite of our education, experience, and background, we have been unable to understand

why our daughter Josie is ineligible for services. We also have access to the internet and have been given a copy of the directive on eligibility. However, the directive specifically mentions that an IQ of below 70 is what is considered "mentally retarded." Furthermore, the directive offers little assistance on what is considered a related disability.

13. My husband and I love our daughter very much. It is very stressful to need so much help and to have so much trouble finding it. The lack of any official rules or regulations promulgated by DDSN that would notify, inform and advise me and others like me of DDSN's policies and procedures within the developmental disability system in South Carolina makes it very difficult to know where to turn. Continuum of Care has agreed to provide services, but their services do not continue into adulthood.

14. Our daughter will need help from an agency like DDSN when she cannot receive services from Continuum of Care and when we are no longer able to care for her. We have been harmed by the lack of regulations because we cannot ensure that services will be there for her in the future. We continue to be harmed as the direct result of those deficiencies, through denial of services for arbitrary and capricious reasons, inadequate services and unequal availability and quality of services, and lack of an appropriate and defined grievance procedure. All these matters affect our daughter's health, safety, well-being, her right to live and participate in the community, and the ability to enjoy appropriate lifestyles.

15. Due to the lack of regulations in the developmental disabilities system administered by DDSN, I do not have reliable information about many aspects of DDSN services, including but not limited to:

a. eligibility for DDSN services;

b. when or how to appeal a denial of eligibility or services;

c. how decisions about budget cuts are being made and whether those decisions are being made by the Commission or DDSN staff; whether those decisions are uniformly being applied; whether some groups of individuals with developmental disabilities are being impacted more than others; and whether the decisions are being uniformly applied.

16. Our daughter has been injured by DDSN's failure to promulgate regulations.

So sayeth Affiant this the 19 day of October, 2010.

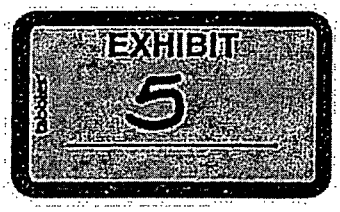
Larrye Hyde

SWORN to and Subscribed before me
this the 19 of Oct. 2010.

C. Hollingsworth
NOTARY PUBLIC for South Carolina

My Commission expires: 1-3-13.

Pag. 5


EXHIBIT
5

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS

COUNTY OF RICHLAND CASE NO. 07-CP-40-2187

PROTECTION AND ADVOCACY FOR PEOPLE WITH DISABILITIES, INC., ET AL.,

Plaintiffs,

vs.

SOUTH CAROLINA DEPARTMENT OF DISABILITIES AND SPECIAL NEEDS, ET AL.,

Defendant.

DEPOSITION OF: JOHN C. VAUGHN

DATE: April 26, 2010

TIME: 11:06 a.m.

LOCATION: Law Offices of Richardson, Plowden & Robinson
1900 Barnwell Street
Columbia, SC

TAKEN BY: Counsel for the Plaintiffs

REPORTED BY: Susan M. Valsecchi, RPR, CRR
Certified Realtime Reporter

A. WILLIAM ROBERTS, JR., & ASSOCIATES

Fast, Accurate & Friendly

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Columbia, SC (803) 731-5224	Greenville, SC (864) 234-7030	Charlotte, NC (704) 573-3919

authority even if they don't have it, right?

A. Then they should be held to account and --

Q. And who holds the executive director of DDSN accountable?

A. The commission is charged with that responsibility.

Q. Does this lawsuit in your mind reflect that some people do not believe the commission held him accountable?

A. It seems to indicate that.

Q. And can you appreciate that people of good faith might reach that conclusion?

A. Apparently they did.

Q. Okay. I've asked you this, but I want to make sure I'm clear about it, as we get ready to go into another area:

Did you ever receive, as a member of the commission, a presentation, legal or otherwise, about regulations and whether or not the commission or the staff should try to avoid them?

A. I don't know. I don't remember any statement or presentation indicating that they were taboo.

Any statements that I'm recalling were

in the vein of, nobody is in danger, let's work on this other thing. I mean, in other words, that's covered, let's get these other things -- let's take first things first kind of approach. In other words, let's get our policies straightened out and then we'll get into these other layers.

Q. And first things first is --

A. -- policy.

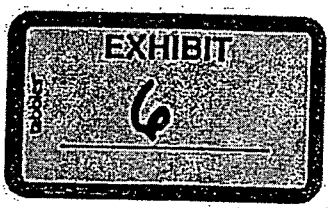
Q. 15 years after the statute is enacted, we don't have everything done, first things first; so before we're going to turn to regulation, we're going to do first things first in 2005 on a statute enacted in 1990.

MR. WOODINGTON: Object to the form of the question.

THE WITNESS: I came on in 2005. I found this in the middle of 2006. We got it changed by the first of 2007. We were moving, is my point. I don't think it would have taken us another 17 years to get it done.

But if I may interject a ministerial comment, the Lord's will be done, and He raises it up and He puts down and we serve and we do the best we can.

Q. Amen.


EXHIBIT
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STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS

COUNTY OF RICHLAND
PROTECTION AND ADVOCACY
FOR THE PEOPLE WITH
DISABILITIES, INC., ET. AL,
Plaintiffs,

vs.
CASE NO. 07-CP-40-2187
SOUTH CAROLINA DEPARTMENT
OF DIABILITIES AND SPECIAL
NEEDS, ET. AL,
Defendants.

DEPOSITION OF: KATHI M. LACY

DATE: July 9, 2009

TIME: 9:30 a.m.

LOCATION: Law Offices of
Richardson, Plowden & Robinson
1900 Barnwell Street
Columbia, SC

TAKEN BY: Counsel for the Plaintiff

REPORTED BY: L. Skyler Hare,
Court Reporter

A. WILLIAM ROBERTS, JR., & ASSOCIATES

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any.

A. Uh-huh.

Q. So I'm trying to understand if the Commission has never even under their minutes discussed policies through regulations, I'm trying to understand how it is that you as the head of the office of policy have been guided with regard to the use of regulations when the Commission's minutes don't reflect any discussion on that issue.

MR. WOODINGTON: I object to the form of that --

BY MR. HAMM:

Q. That's fine, you have to answer. Go ahead and answer.

A. Since I've been at DDSN, the practice has been and the interpretation of the state statue has been that the issuance or promulgation of regulations is permissible but not required. And --

Q. There has been a change in the composition of the Commission.

A. Yes.

Q. Remind me how many -- are there seven members of the Commission?

A. Yes.

Q. And am I correct that, what, there's

Q. All right. Have you had that conversation with the -- Dr. Laurent, the new Director?

A. Dr. Laurent did -- we did have a conversation about that.

Q. All right. Tell me about that conversation.

A. I just told him what my understanding was of the state statute.

Q. And that understanding is what?

A. It that the promulgation of regulations is permissible.

Q. Okay. And who decides -- who decides what the policy is with regard to DDSN with regard to how they create policies? Is that you or the Commission?

A. Of how policies are created?

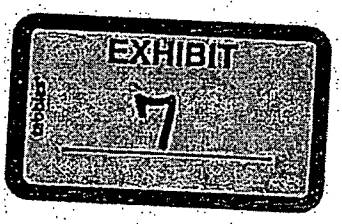
Q. Yes.

A. The only policies that we have are created by the Commission.

Q. Okay. But you told me you don't have a process of having the Commission review and approve directives, right?

A. That's right.

Q. And you've told me that you had not had


EXHIBIT
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STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS

COUNTY OF RICHLAND
PROTECTION AND ADVOCACY
FOR THE PEOPLE WITH
DISABILITIES, INC., ET. AL,
Plaintiffs,
vs. CASE NO. 07-CP-40-2187
SOUTH CAROLINA DEPARTMENT
OF DIABILITIES AND SPECIAL
NEEDS, ET. AL,
Defendants.

DEPOSITION OF: KATHI M. LACY

DATE: July 9, 2009

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LOCATION: Law Offices of
Richardson, Plowden & Robinson
1900 Barnwell Street
Columbia, SC

TAKEN BY: Counsel for the Plaintiff

REPORTED BY: L. Skyler Hare,
Court Reporter

A. WILLIAM ROBERTS, JR., & ASSOCIATES

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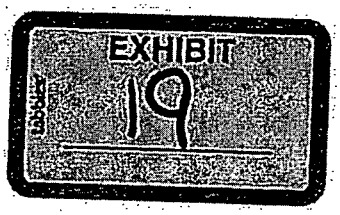
mean, I've experienced times where we've tried to use the regulatory process to no avail. In fact, Ms. Gloria Prevost in this room has been part of a subcommittee where we were trying to get DHEC law changed and we got nowhere through the legislative process by promulgating regulations. And I explained to that subcommittee that DDSN could have handled that request instantly by changing a contract or a directive.

So I've been involved in times where the regulatory process is ineffective, it's not time sensitive and it's -- you know, our process that we have in place gives the entire public, the nation really, an opportunity to comment at any time on any of our directives.

Q. But we've already -- we've already established that you don't have a procedure or a directive to deal with folks that may not have access to the Internet, correct?

A. That is correct.

Q. Okay. And you've already told me that you don't publish notices of potential changes in directives and anything in newspapers, you don't do it in the documents. What's the state -- and you don't do it in the State Register, correct?


EXHIBIT
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STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS

COUNTY OF RICHLAND
PROTECTION AND ADVOCACY
FOR THE PEOPLE WITH
DISABILITIES, INC., ET. AL,
Plaintiffs,

vs. CASE NO. 07-CP-40-2187
SOUTH CAROLINA DEPARTMENT
OF DIABILITIES AND SPECIAL
NEEDS, ET. AL,
Defendants.

DEPOSITION OF: KATHI M. LACY

DATE: July 9, 2009

TIME: 9:30 a.m.

LOCATION: Law Offices of
Richardson, Plowden & Robinson
1900 Barnwell Street
Columbia, SC

TAKEN BY: Counsel for the Plaintiff

REPORTED BY: L. Skyler Hare,
Court Reporter

A. WILLIAM ROBERTS, JR., & ASSOCIATES

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had been there had been the understanding that the promulgation of regulations was not something that we did because we used other vehicles to -- to issue directives and hold people accountable to what our expectations were.

Q. All right. And tell me how you arrived at that understanding.

A. From reading the code, the state statute.

Q. Okay. So had you -- I'm not asking what you were told. Have you met with your legal counsel at any time during your service as the office of policy to discuss the issue of promulgation of regulations of policy?

A. Have I met with my legal staff -- repeat it again, I'm sorry.

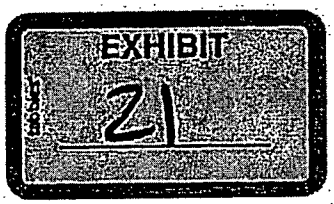
Q. You met with your legal staff --

A. Uh-huh.

Q. I mean, with regard to the issue of promulgations of regulations, since you've just told me you told Andy Laurent your understanding of the law was that you didn't do it.

A. That we -- that we were not required to promulgate regulations.

Q. All right. And but that's an


EXHIBIT
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STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS

COUNTY OF RICHLAND
PROTECTION AND ADVOCACY
FOR THE PEOPLE WITH
DISABILITIES, INC., ET. AL,
Plaintiffs,
vs. CASE NO. 07-CP-40-2187
SOUTH CAROLINA DEPARTMENT
OF DIABILITIES AND SPECIAL
NEEDS, ET. AL,
Defendants.

DEPOSITION OF: KATHI M. LACY

DATE: July 9, 2009

TIME: 9:30 a.m.

LOCATION: Law Offices of
Richardson, Plowden & Robinson
1900 Barnwell Street
Columbia, SC

TAKEN BY: Counsel for the Plaintiff

REPORTED BY: L. Skyler Hare,
Court Reporter

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A. The other -- I'm responsible for five different divisions.

Q. What are they?

A. Mental retardation, head and spinal cord injury, autism, consumer assessment team. They are the group that determine eligibility. And quality management.

Q. Is the position that you hold now that same position that you've earned -- that you were appointed to? Who -- well, let me -- first answer that.

A. I'm in the same position.

Q. And who -- did Dr. Butkus -- who -- I don't understand --

A. Dr. Butkus, yes, hired me in the position I am in now.

Q. Okay. Now, you make -- you told me that you were responsible for directives of the department.

A. Yes.

Q. Tell me what a directive is.

A. It's comparable to policy and it describes certain expectations that the department has regarding people that we support, services that they receive, the responsibilities that providers

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
Protection and Advocacy for the People with Disabilities, Inc.; et al Plaintiffs, v. South Carolina Department of Disabilities and Special Needs, et al, Defendants.	)	C/A No.: 2007-CP-40-2187 **CERTIFICATE OF SERVICE**

RICHLAND COUNTY
FILED
2013 OCT 17 PM 5:03
JEANETTE W. WALDE
C.C.P. & G.S.

I, the undersigned employee of Richardson Plowden & Robinson, P.A., do hereby certify that I have served the **PLAINTIFFS' NOTICE OF AND MOTION TO ALTER, AMEND OR RECONSIDER JUDGMENT PURSUANT TO RULE 59(E), SCRCP** in the above-captioned matter upon all counsel of record this 17th day of October 2013, by hand-delivery to:

The Hon. G. Thomas Cooper, Jr.
SC Circuit Court
Richland County Judicial Center
1701 Main Street
Columbia, SC 29202

as well as by e-mail and by depositing a copy of same in the U.S. Mail, postage prepaid, addressed as follows on the parties indicated below:

William H. Davidson, II, Esq.
Kenneth P. Woodington, Esq.
Davidson Morrison & Lindermann, PA
P.O. Box 8568
Columbia, SC 29202
kwoodington@dml-law.com
wdavidson@dml-law.com

The Hon. G. Thomas Cooper, Jr.
S.C. Circuit Court
PO Box 192
Columbia, SC 29202
gcooperj@sccourts.org

Kathy J. Templeton

Kathy J. Templeton

October 17, 2013

STATE OF SOUTH CAROLINA	)	
	)	**IN THE COURT OF COMMON PLEAS**
COUNTY OF RICHLAND	)	
	)	
Protection and Advocacy for the People with Disabilities, Inc., et al.,	)	Civil Action No. 07-CP-40-2187
	)	
Plaintiffs,	)	**DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION TO ALTER OR AMEND, ETC.**
	)	
v.	)	
	)	
South Carolina Department of Disabilities and Special Needs; et al.,	)	
	)	
Defendants.	)	
	)	

Defendants in this action, the South Carolina Department of Disabilities and Special Needs, et al., oppose, with one exception, Plaintiffs' Motion to Alter or Amend for the reasons set forth herein.

1. Plaintiffs' first point, Motion at 1-3, is devoted almost exclusively to arguing that one federal district court case, *Pennsylvania Protection and Advocacy, Inc. v. Houston*, 136 F.Supp.2d 353 (E.D.Pa. 2001), supports Plaintiffs' claim that the entity P & A has standing in this case. Plaintiffs further argue that the Order "incorrectly applied" the rulings in that case. Motion at 1.

Plaintiffs are simply incorrect in arguing that the Order denied standing to P & A as an entity, based on *Pennsylvania Protection and Advocacy*. The Order did cite that case, but only in support of its conclusion that P & A did not have standing to sue on behalf of one or more of its constituents, as opposed to suing on behalf of the entity itself. Order at 6. In the subsequent two paragraphs of the Order, the standing of P & A based on alleged injury to itself is discussed. Order at 6-7. In those paragraphs, the Order holds, without reference to *Pennsylvania Protection*

and Advocacy, that P & A has failed to show injury to itself, noting that the Prevost affidavit makes only a conclusory statement that P & A has been injured. Further, the Order at p. 7 holds that standing to sue is not established by P & A's claim that it is allegedly time-consuming for P & A to search DDSN's online directives. Plaintiffs' motion adds nothing to its prior showing. Plaintiff's argue that Defendants should have conducted discovery about P & A's activities, Motion at 3, but Plaintiffs simply did not make a showing that would have required the Defendants to make a factual showing in response. It is well settled that the party seeking to establish standing carries the burden of demonstrating that standing exists. *See, e.g., Commander Health Care Facilities, Inc. v. South Carolina Dept. of Health and Environmental Control*, 370 S.C. 296, 301, 634 S.E.2d 664, 666 (Ct. App. 2006). Plaintiffs did not meet that burden.

Finally, to the extent that the *Pennsylvania Protection and Advocacy* case held that the organization in that case had standing, the decision involved only a motion to dismiss, and was based on the factual allegations made by the organization in that case in its Complaint. The court in the case specifically held that its decision on standing might be reversed if the case had been at the summary judgment stage, instead of merely at the pleadings stage. 136 F.Supp.2d at 363. A check of the federal PACER records indicates that the case was later dismissed with no further substantive orders having been issued.

2. Plaintiffs' Point 2, Motion at 4, refers generally to the APA, but does not cite any specific section of that statute. This point also refers to standing, but then proceeds to argue the need for regulations, which is an issue that pertains to the merits of the case. To the extent that Plaintiffs are claiming that the APA itself is a source of a requirement to promulgate regulations, that contention was foreclosed in *South Carolina Ambulatory Surgery Center Ass'n v. South Carolina Workers' Compensation Commission*, 389 S.C. 380, 390, 699 S.E.2d 146, 152

(2010)(Section 1-23-110 of the APA "merely provides for the procedures that must be followed whenever a regulation is otherwise mandated"). Plaintiffs also cite several constitutional provisions dealing with due process, but *Ambulatory Surgery, supra,* also disposes of that contention, holding that a property interest must be shown before due process is implicated. 389 S.C. at 392, 699 S.E.2d at 153. Plaintiffs have not demonstrated that they have property interest. Moreover, the Complaint does not contain any claims based on alleged constitutional deprivations.

3. Plaintiffs' third point, Motion at 4-5, concerns the Declaratory Judgment Act, §§ 15-53-10, et seq. This Court's Order, p. 4, n. 1, holds that an action brought pursuant to that Act must involve a justiciable controversy and a plaintiff with standing. Plaintiffs' arguments under this point are limited to stating that if the case is ripe for adjudication, then Plaintiffs must have standing, but this is clearly not the law. A controversy can be ripe for adjudication between a defendant and a particular plaintiff who has standing, but even if a controversy may be ripe as to *someone*, such ripeness does not establish as a matter of logic that the controversy is ripe between *anyone and everyone*. This point by Plaintiffs essentially provides no argument on the issue of standing. As a result, nothing is presented that was not covered by p. 4, n.1, of the Order.

4. Plaintiffs' fourth point, Motion at 6-7, consists of a reiteration of their rejected "binding norm" argument, although that term is not used. Plaintiffs' argument on "binding norms" was addressed at pp. 8-9 and 16-18 of the Order. There it was held, among other things, that when a party claims harm from the imposition of an alleged "binding norm," as opposed to a regulation, the party must show actual harm to itself and prejudice from the absence of a regulation. Such harm or prejudice has not been shown by Plaintiffs in this case. None of the authorities cited by Plaintiffs on pp. 6-7 of their motion involved a case in which the plaintiff had

not shown harm to itself as a specific result of the enforcement of the alleged "binding norm." For all the reasons set forth above, Plaintiffs' claims in this regard lack merit.

5. Plaintiffs' fifth point raises one issue for which the Defendants agree that a modification of language in the concluding part of the Order could be appropriate, although without change to the ultimate result of the case. To the extent that the Order's concluding language would preclude a plaintiff from raising issues for which the only reason for dismissal was lack of standing, DDSN does not intend to claim in the future that § 3(b) of the Order, pp. 16-18 would preclude the raising of the issues therein by person with standing in a subsequent administrative proceeding that pertains to matters that could not have been raised in this case. The suggested amended language that would accomplish this is as follows:

> For the foregoing reasons, the Court concludes that Plaintiff's Motion for Summary Judgment should be denied, Defendants' Motion for Summary Judgment should be granted, and that this action should be, and hereby is, dismissed with prejudice ~~in all respects.~~ **with respect to the merits issues discussed in § 3(a) of the Order, pp. 9-16. This dismissal, however, shall not preclude P & A or any individual Plaintiff from raising, in subsequent administrative appeals involving specific individuals, the issues discussed in § 3(b) of the Order, pp. 16-18, so long as such subsequent appeals involve matters that could not have been raised in the present case.**

6. Plaintiffs' Points 6 through 8, Motion at 8-15, is devoted primarily to rearguing their previous claims concerning the interpretation of S.C. Code Ann. Sections 44-20-220, 44-20-790, and 44-26-180. The Order addressed the interpretation of those statutes at pp. 9-15. This part of the motion merely reiterates prior arguments by Plaintiffs on those issues, and does not suggest the Order failed to address any of Plaintiffs' claims or that it raised issues not previously addressed by the parties. Plaintiffs have therefore not shown any reason, not previously argued by them, why the Order should be changed in any respect.

7. Plaintiffs' Point 9, Motion at 15, takes issue with the Court's holding on "public interest" standing (Order at 7-8), but does not challenge the core holding of the Order on that point. The Order held that the issues in the cases cited by Plaintiffs were primarily legal issues, rather than issues involving an intense, case-by-case, factual showing as to how specific plaintiffs are, or are not, affected by the absence of regulations in specific situations. Order at 7. Plaintiffs make the conclusory argument that they are not seeking relief in "multiple, unproven factual situations," Motion at 15, but they provide no evidence about the facts of any Plaintiff's case. As a result, this point does not effectively challenge the Order's conclusions on this issue.

8. In their Point 10, p. 15, Plaintiffs argue for the first time that their claims should be heard because they are "capable of repetition yet evading review." In addition to having been raised belatedly, this claim is without merit. Any individual who is affected by an adverse DDSN decision is capable of appealing that decision through administrative channels and then through the courts. Other than conclusory statements, Plaintiffs make no attempt to argue why it would be otherwise.

9. In their Point 11, pp. 15-17, Plaintiffs refer to the statute requiring informed consent when research is to be performed on human subjects. S.C. Code Ann. § 44-26-180. On this point, the Order held that

> [T]here is nothing in the Complaint to indicate that any individual Plaintiff has ever been the subject of "research conducted by, for, or in cooperation with the department." § 44-26-180. Indeed, the Complaint alleges no facts at all with reference to research on human subjects. As a result, in addition to lacking standing generally, Plaintiffs clearly lack standing to complain with regard to § 44-26-180.

Order at 12. Plaintiffs argue only that they have alleged that research on human subjects, among other things, is an issue "of critical concern to applicants and recipients of [DDSN's] services. . . . " Motion at 17. However, the Order held that

> Plaintiffs have not cited even a single instance of how a specific individual Plaintiff has actually suffered any kind of injury in fact as a result of the claims set forth in the Complaint. There is not even a discussion of facts pertaining to any individual Plaintiff, much less an indication as to how any particular Plaintiff has been injured.

Order at 5. An allegation that a matter is of "critical concern" is not something that rises to the level of alleging specific facts showing an injury. As a result, this claim of Plaintiffs is without merit.

10. Finally, Plaintiffs' Point 12, Motion at 17, seems to contend that the Defendants should have made some kind of affirmative showing that Plaintiffs lack standing. However, as already noted above, the party seeking to establish standing carries the burden of demonstrating that standing exists. *Commander Health Care Facilities, Inc. v. South Carolina Dept. of Health and Environmental Control*, 370 S.C. 296, 301, 634 S.E.2d 664, 666 (Ct. App. 2006). The Order correctly held that Plaintiffs had not made the requisite showing, and Plaintiffs' Point 12 is therefore without merit.

CONCLUSION

For the foregoing reasons, Defendants submit that Plaintiffs' motion for reconsideration should be denied in its entirety, except for the possible change to the conclusion of the Order, as set forth in Paragraph 5 above.

Respectfully submitted,

DAVIDSON & LINDEMANN, P.A.

By: /s/

WILLIAM H. DAVIDSON, II
KENNETH P. WOODINGTON
1611 Devonshire Drive, Second Floor
Post Office Box 8568
Columbia, South Carolina 29202
T: (803) 806-8222
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ATTORNEYS FOR DEFENDANTS

Columbia, South Carolina

November 20, 2013

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
COUNTY OF RICHLAND	)	
Protection and Advocacy for the People with Disabilities, Inc., et al.	)	Civil Action No. 07-CP-40-2187
Plaintiffs,	)	**CERTIFICATE OF SERVICE**
v.	)	
South Carolina Department of Disabilities and Special Needs; et al.	)	
Defendants.	)	

The undersigned employee of Davidson & Lindemann, P.A., attorneys for the Defendants, does hereby certify that service of the **DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION TO ALTER OR AMEND, ETC.** in the above-captioned action was made upon all counsel of record by hand delivery, at the below listed address clearly indicated on said envelope this the 20th day of November, 2013, addressed as follows:

The Honorable G. Thomas Cooper, Jr.
South Carolina Circuit Court Judge
Post Office Box 192
Columbia, South Carolina 29202

Steven W. Hamm, Esquire
C. Jo Anne Wessinger Hill, Esquire
Richardson, Plowden & Robinson, P.A.
1900 Barnwell Street
Columbia, South Carolina 29201

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	FIFTH JUDICIAL CIRCUIT
Protection and Advocacy for People with Disabilities, Inc., et al., Plaintiffs, v. South Carolina Department of Disabilities and Special Needs, et al., Defendants.	Case No.: 07-CP-40-2187 **PLAINTIFFS' REPLY IN SUPPORT OF THEIR NOTICE OF AND MOTION TO ALTER, AMEND OR RECONSIDER JUDGMENT PURSUANT TO RULE 59(E), SCRCP**

TO: THE HONORABLE G. THOMAS COOPER, JR.; AND WILLIAM H. DAVIDSON, II, ESQUIRE AND KENNETH P. WOODINGTON, ESQUIRE, ATTORNEYS FOR DEFENDANTS

As the Plaintiffs set forth in their timely filed Motion and Memorandum pursuant to SCRCP 59(e), the Plaintiffs seek relief for the reasons set forth and argued in their Rule 59(e) Motion and this Reply. The Plaintiffs do not abandon, but are specifically preserving, all issues or arguments presented at the motion hearing, as well as in their Motion, its exhibits, Reply and any supporting Memoranda, affidavits, or documents presented to the Court and/or filed with the Clerk of Court in this action.

ARGUMENT

1. With regard to the Plaintiffs' assertions that the Court incorrectly held or failed to hold that P&A does not have standing in its Order, the Defendant incorrect mischaracterizes the Plaitniffs' position and arguments in its Rule 59(e) Motion. Plaintiffs do not limit their argument or position on standing in Item 1 of its Rule 59(e) motion simply to a misapplication of the rulings in *Penn. Prot. & Advocacy, Inc. v. Houston,* 136 F. Supp.2d 353, 365-67 (E.D.Pa. 2001).

It is broader than that. The Plaintiffs assert and argue that "[t]he Order incorrectly holds and finds that P&A does not have standing based on its state and federal mandate to advocate for individuals with developmental disabilities." Motion at 1. The Plaintiffs further claim and add that "the Court incorrectly applied the rulings in *Penn. Prot. & Advocacy, Inc. v. Houston,* 136 F. Supp.2d 353, 365-67 (E.D.Pa. 2001)" and that the Court did rely upon such case as a basis to deny Plaintiff P&A standing. Motion at 1. In *Penn. Prot. & Advocacy, Inc. v. Houston, supra,* the Court found that Pennsylvania Protection & Advocacy did have standing, as the Court should find in this case at hand.

Plaintiff P&A is the only entity explicitly designated by the General Assembly of South Carolina as the State's Protection and Advocacy system to implement the federal Developmental Disabilities Assistance and Bill of Rights Act of 1975 (Public Law 94-103, 42 U.S.C.A. §§15001 *et. seq.*). These responsibilities require Plaintiff P&A to interact with and to advocate before state and federal agencies for the purpose of implementing legislative policies and providing services to the population of disabled and handicapped people served in the State of South Carolina by Defendant DDSN and other agencies. Under the federal Developmental Disabilities Assistance and Bill of Rights Act of 1975 (Public Law 94-103), each state was required to have a statewide protection and advocacy system in place by October 1, 1977. The purpose of the federal Act is to safeguard the rights of people with developmental disabilities so the State's designated entity had to be independent of any state agency that provided residential or other services to people with developmental disabilities. The P&A system created and ratified by the General Assembly is to provide legal and other advocacy to (1) protect people with developmental disabilities from abuse and neglect and (2) advocate for them when they had been denied disability rights. In September 1977, Governor James Edwards designated the

organization started by Louise Ravenel and called "Advocacy for Handicapped Citizens" as the organization in the State of South Carolina to implement statewide protection and advocacy services for citizens with disabilities. Then in 1979, the South Carolina General Assembly enacted legislation that established P&A as the protection and advocacy organization in South Carolina. Since the 1970s, laws have been passed in Congress to expand the authority of all state protection and advocacy systems, including the Plaintiff P&A in South Carolina.

Under 42 U.S.A.C. §15043, state protection and advocacy organizations ***have the authority to: (i) pursue legal, administrative, and other appropriate remedies or approaches to ensure the protection of, and advocacy for, the rights of such individuals within the State*** who are or who may be eligible for treatment, services, or habilitation, or who are being considered for a change in living arrangements, with particular attention to members of ethnic and racial minority groups. 42 U.S.C.A. §15043 (emphasis added). There are examples of the state protection and advocacy organizations having their standing examined and found to have standing. In the case of *West Virginia Advocates, Inc. v. Board of Educ. of Monongalia County*, 2005 WL 2076620 (N.D.W.Va.), the Federal District Court of West Virginia found that designated West Virginia Protection and Advocacy organization did have standing to sue on its own behalf, as well as to sue on behalf of others in a representative capacity and on behalf of others that it represents since it is also an extension of the those individuals represented and whose rights are protected by the P&A in its enabling legislation and purpose. See, S.C. Code §43-33-350 (requiring Plaintiff P&A to protect and advocate for the rights of all developmentally disabled and handicapped persons by pursuing all legal, administrative and other means); see, also, Motion at Exhibit D, Hyde Affidavit (statements of harm and injury). This action is brought by Plaintiff P&A in accordance with its responsibilities as the designated state protection

and advocacy system to implement the Federal Developmental Disabilities Act and related state and federal acts. Additionally, the Defendant makes mere unsubstantiated statements that Ms. Prevost's affidavit is conclusory as the Defendant never engaged in any written discovery, depositions or other inquiry of the Plaintiff's claims. Whereas, the Plaintiffs did engage in discovery and provided in details in their previously filed memorandums and motions concerning the complete disregard by the Defendant to adhere and follow the "shall promulgate regulations" mandate of the General Assembly. See, Motion at 2-3.

2. With regard to Defendants' statement in Item 2 that the SC Administrative Procedures Act is the source of the DDSN's requirement to promulgate regulations, the Plaintiffs have alleged and claimed in their pleadings, memoranda, and motions that DDSN is mandated to promulgate regulations in SC Code §§ 44-20-220, 44-20-790 and 44-26-180. Motion at 4, and 8-17. When the Legislature delegated the power and requirement for DDSN to promulgate regulations as mandated in SC Code §§ 44-20-220, 44-20-790 and 44-26-180, the APA is the process and procedure that the state agency (DDSN) must follow.[1] Every regulation is subject to the rule making procedures of the APA unless the General Assembly specifically states otherwise. The General Assembly **did not exempt** DDSN from the APA process in promulgating regulations and it **did not direct** that DDSN could use directives or other means similar to a regulation but without the required process, notice, rights to contest, or procedure. DDSN chose not to promulgate regulations. As Dr. Lacy stated under oath in her deposition, "there had been the understanding that the promulgation of regulations was not something that [DDSN] did...." *See,* Lacy Deposition, 100:1-5, Exhibit 19 to Plaintiffs' Memorandum in

[1] Sections 1-23-60, 1-23-90, 1-23-110 (advance determination/notice and contest by the courts), 1-23-111, 1-23-115, 1-23-120, and 1-23-125 of the SC Code (APA) provide the process for an agency to use in promulgating regulations for review and approval by the General Assembly.

Support of its Motion for Summary Judgment. Anything that should be in a regulation by DDSN had been "covered already." *See*, Vaughn Deposition, 150:2-3, Exhibit 23 to Plaintiffs' Memorandum in Support of its Motion for Summary Judgment.

Recall, DDSN admits and states in its discovery answers to the Plaintiffs' Requests for Admission that it has not promulgated regulations even though required to do so by the General Assembly[2]:

> Question: "18. That the South Carolina Department of Disabilities and Special Needs has not promulgated regulations subject to review by the public or by the General Assembly in accordance with the Administrative Procedures Act which set forth policies for research on human subjects as required by S.C. Code §44-26-180."
>
> Answer: "18. It is admitted that the Department [DDSN] has not promulgated regulations of the kind described in this request...."
>
> Question: "19. That the South Carolina Department of Disabilities and Special Needs has not promulgated regulations subject to review by the General Assembly or by the public in accordance with the Administrative Procedures Acts which set forth standards, procedures or process to obtain informed consent of individuals receiving service."
>
> Answer: "19. It is admitted that the Department [DDSN] has not promulgated regulations of the kind described in this request...."

See, also Plaintiffs' Motion for Summary Judgment and Supporting Memorandum for additional citations and statements by DDSN regarding failure to promulgate regulations.

3. With regard to items 3, 4, and 6-10 of the Defendant's Response and Return, the Plaintiffs disagree with the Defendants. The Plaintiffs reassert their arguments and positions as set forth in its Rule 59(e) Motion as well as its Exhibits A, B, C and D. See, Motion.

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[2] The Plaintiffs argue that since the General Assembly stated that DDSN "shall" promulgate certain regulations in Sections 44-20-220, 44-20-790 and 44-26-180, DDSN has a mandatory duty to promulgate regulations which it has knowingly and admittedly failed to do. Under the rules of statutory interpretation, use of words such as 'shall' or 'must' indicates the legislature's intent to enact a mandatory requirement." *Bradley v. Doe*, 374 S.C. 622, 634, 649 S.E.2d 153, 160 (Ct. App. 2007).

4. With regard to item 5 of the Defendant's Response and Return, the suggested "fix" or correction proposed by the Defendants to address the claim by the Plaintiffs' in their Rule 59(e) motion[3] **does not** correct or fix the issue raised in the Plaintiffs' Motion regarding page 18 of the Order dated September 24, 2013 (Exhibit A) where the Order states that:

> ... the Court concludes that Plaintiff's Motion for Summary Judgment should be denied, Defendants' Motion for Summary Judgment should be granted, and that this action should be, and hereby is, ***dismissed with prejudice in all respects***."

See, Order of the Honorable G. Thomas Cooper, Jr. dated September 24, 2013 at 18 (emphasis added). The same problem asserted by the Plaintiffs continues with the Defendants' proposal and still violates the substantial constitutional rights of the Plaintiffs, including the Plaintiff P&A. It also continues to limit all of the Plaintiffs' access to equal protection and due process of law and conflicts with the statutory responsibilities and duties of Plaintiff P&A as the organization designated by the General Assembly of South Carolina as the State's Protection and Advocacy system to implement the federal Developmental Disabilities Assistance and Bill of Rights Act of 1975.

All Plaintiffs are still forever barred from the raising the issues asserted in the Complaint the next time an individual plaintiff incurs additional expense and cost in fighting for services when they were not noticed any changes or advised that DDSN changed their standards without notice to the Plaintiff or to their guardian/representative. For example, DDSN changes the standards for supervision of the program so that 24 hours a day on-site supervision is not provided to the plaintiff anymore or it is no longer available to the plaintiff due to eligibility

[3] On page 7-8 of the Plaintiffs' Rule 59(e) Motion validly raises how such broad holding prejudices and adversely affects the substantial constitutional rights of the Plaintiffs, including the Plaintiff P&A, as well as limiting their access to equal protection and due process of law. It also directly conflicts with the ability of the Plaintiff P&A, as well as each the individually named Plaintiffs, raise the claims outlined in this lawsuit or asserting the right or need for the promulgation of regulation due to the injury and harm the next time they are denied services and not advised of their rights to appeal, or not advised of the criteria for services, or other harm to the rights of this protected group of citizens.

criteria changes after being on the wait-list for months or years. If that Plaintiff is one of the individual named Plaintiffs and he or she is aggrieved, injured and harmed, they cannot forever and ever raise a claim of harm based upon the failure of DDSN to promulgate regulations setting forth such eligibility criteria or standards. Nor can Plaintiff P&A raise the issue for anyone that it would assist and represent in the future as part of its mandated statutory responsibilities – regardless of whether they were one of the individual named Plaintiffs or not, and regardless if it is subsequent or repetitive act by DDSN of the same problem and issue – since Plaintiff P&A is forever and ever barred by the Order. Remember, without the use of regulations, DDSN can change all policies and procedures daily, hourly or however and whenever it wants without any of the checks, balances and protections provided the Administrative Procedures Act, which any and all agencies are required to follow in their mandate by the General Assembly when the agency "shall" promulgate regulations, so that citizens are aware of the process of regulation development and promulgation, the basis for such determination of policy by the agency to implement the intent of the General Assembly and the ability for participation and review by citizens and the General Assembly. The proposal by the Defendant to Item 5 is not a solution to the problem, but another way to keep the same problem outlined in Item 5 of the Plaintiffs' Rule 59(e) Motion.

5. With regard to all points raised by the Defendants in their response and to all points raised by the Plaintiffs in their Motion concerning the error regarding the ruling(s) of no standing, including the claims by the Plaintiffs' of a denial of rights under the APA, substantial constitutional rights, equal protection of the law and due process, Section 1-23-110 of the South Carolina Code of Laws provides that the Plaintiffs have the right to contest a regulation on the ground of noncompliance with the procedural requirements. S.C. Code §1-23-110(D). No such

right exists for the establishment of DDSN policy through the use of directives or other means. However, when the state agency (DDSN) refuses to follow the APA or uses some "other means" than regulation to set forth and implement policy, the Plaintiffs are denied the substantive right in violation of public policy for the State of South Carolina when DDSN does not use the APA or promulgate regulations but rather uses other means. This statutory right (to contest any regulation) is granted to all, including the Plaintiffs, and is a property interest and a non-waivable, fundamental right belonging to the Plaintiffs that further supports their claims of standing. *Herron v. Century BMW (Herron I)*, 387 S.C. 525, 536, 693 S.E.2d 394, 399, 72 UCC Rep.Serv.2d 409 (2010) (Existence of a specified stated right set forth in statute by the General Assembly is non-waivable and is a substantive right establishing public policy).

For these reasons and the arguments set forth in the Plaintiffs' Rule 59(e) Motion, the Plaintiffs' Motion for Summary Judgment, their Memorandum in Support of the Motion for Summary Judgment, the laws and constitutions of the State of South Carolina and United States, the Plaintiffs respectfully move this Court for an Order altering or amending the September 24, 2013 Order granting the Defendants' Motion for Summary Judgment and denying Plaintiffs' Motion for Summary Judgment. Specifically, the Plaintiffs seek a ruling vacating the Order and permitting further hearings and argument by the Plaintiffs and all parties to this action. In the alternative, for an Order altering or amending judgment to remove the "dismissal with prejudice restriction" for any and all Plaintiffs so that these issues may be raised as needed by individual Plaintiffs and by the Plaintiff P&A as may be needed and required in further of its statutory responsibilities, and for judgment in favor of the Plaintiffs holding that DDSN is required to promulgate regulations "to obtain informed consent and to protect the dignity of the individual" as specified by S.C. Code Ann. § 44-26-180.

Respectfully submitted,

RICHARDSON, PLOWDEN, & ROBINSON, PA

BY: _____

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ATTORNEYS FOR PLAINTIFFS

Columbia, South Carolina
December 18, 2013

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

FIFTH JUDICIAL CIRCUIT

Protection and Advocacy for People with Disabilities, Inc., et al.,

Plaintiffs,

v.

South Carolina Department of Disabilities and Special Needs, et al.,

Defendants.

Case No.: 07-CP-40-2187

CERTIFICATE OF SERVICE

I, the undersigned attorney with the firm of Richardson Plowden and Robinson, P. A., attorneys for the Plaintiffs, do hereby certify that I have served upon the following the foregoing document (Plaintiffs' Reply In Support of Their Notice of and Motion to Alter, Amend or Reconsider Judgment Pursuant to Rule 59(E), SCRCP) as indicated below on December 18, 2013 by depositing the same in the US Postal Service System:

VIA U.S. MAIL
Kenneth P. Woodington, Esq.
1611 Devonshire Drive, Second Floor
PO Box 8568
Columbia, SC 29202

VIA U.S. MAIL
The Honorable G. Thomas Cooper, Jr.
Circuit Court Judge
Richland County Courthouse
P.O. Box 192
Columbia, South Carolina 29202-0192

C. Jo Anne Wessinger Hill

December 18, 2013
Columbia, South Carolina

STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
County of Richland	)	2007-CP-40-02187
	)	
	)	
PROTECTION AND ADVOCACY FOR THE PEOPLE WITH DISABILITIES, INC. et al.,	)	
	)	
APPELLANT,	)	
	)	
vs.	)	TRANSCRIPT OF RECORD
	)	
SOUTH CAROLINA DEPARTMENT OF DISABILITIES AND SPECIAL NEEDS,	)	
	)	
RESPONDENT,	)	

August 6, 2013
Columbia, South Carolina

BEFORE:

THE HONORABLE G. THOMAS COOPER, JR., JUDGE.

APPEARANCES:

JO ANNE WESSINGER HILL, ESQ.
STEVE HAMM, ESQ.
Attorneys for the Applicant

KENNETH WOODINGTON, ESQ.
Attorney for the Respondent

KAREN AMBROZIAK
Official Court Reporter

C O N T E N T S

INDEX OF EXHIBITS:

(There were no exhibits introduced.)

INDEX OF WITNESSES:

(There were no witnesses called.)

THE COURT: Go ahead with the motion.

MR. HAMM: Well, at this point, Your Honor, the litigation for which my motion is directed was filed in 2007. I'm the one that brought the issue into contest.

I think it would -- I would respectfully suggest it would be appropriate to hear from us first, be the world is not going to come to an end. I'm going to have my say regardless so...

But I think it would be appropriate for us to start. If the Court deems otherwise, that's -- that's fine with me, as well, Your Honor.

THE COURT: Well, explain to me -- we might as well start with the plaintiff and -- go ahead.

(Off the record.)

MR. HAMM: If I can make one further inquiry, before I begin, Your Honor. In the file -- but I don't know that it's been tendered to you -- you should have a series of documents in support of my motion.

Ms. Wessinger tells me that in those documents I did not include the affidavit of Gloria Prevost, the Executive Director. Just for purposes of today's argument, I'd at least like to --

MS. HILL: It has been previously filed.

MR. HAMM: It has been previously filed. I just wanted to tender it, because I'm not certain you might

have it.

THE COURT: What exhibit is it to your motion?

MS. HILL: It's not.

MR. HAMM: It's not an exhibit, Your Honor. I made reference to it in my memorandum.

MR. WOODINGTON: Your Honor, it was filed years ago, I think.

MR. HAMM: Yes.

MR. WOODINGTON: I don't have a problem with that. While we're on housekeeping, I just -- I'm not sure. They filed -- they filed some excerpts from three depositions that were taken on this case. They originally were wrote some years ago. We all refer to it as if they've been supplied to the Court. I don't know if the full depositions are in the Court's file or not.

THE COURT: No.

MR. WOODINGTON: It's not? Did you say no? I'm sorry.

THE COURT: There are no original depositions.

MR. WOODINGTON: Well, when -- would it be all right after this hearing is over to supply the Court with a copy of those depositions, those three depositions?

THE COURT: That's up to you.

MR. HAMM: I would -- I would like to do that so there's no question that they are -- there are excerpts --

THE COURT: They are excerpts attached?

MS. HILL: Yes.

THE COURT: -- excerpts attached to Mr. Hamm's motion?

MR. HAMM: That's correct, Your Honor.

THE COURT: But they're only excerpts.

MR. WOODINGTON: If it's all right, I'd like to just get a copy of all three of those depositions in the Court's file.

THE COURT: That's quite all right.

MR. HAMM: May I approach and hand you this affidavit I made reference to, Your Honor?

THE COURT: Assuming there's no objection from Mr. Woodington.

MR. WOODINGTON: No objection. It was filed years ago, as he said.

THE COURT: All right.

MR. HAMM: Your Honor, one final matter as a matter of guidance. I know that you have a busy schedule. If you would enlighten us with the time that constraint to this proceeding.

I know that you have other matters, and I know you changed -- you moved this hearing now because you had other obligations. I want to make sure our argument doesn't interfere with that. So if you can just give me

some guidance.

THE COURT: Well, I need to be out of here no later than 2:15 and would prefer to be out by two o'clock.

MR. HAMM: That looks about 20 minutes aside based on what I see on the clock on the wall at the courthouse.

THE COURT: It runs over.

MR. HAMM: Well, I will endeavor to comply with that timeframe, Your Honor. May I proceed?

THE COURT: Certainly.

MR. HAMM: Your Honor, as I stated a moment ago, Jo Anne Wessinger Hill and I represent the Protection and Advocacy for the People with Disabilities. The action before you we bring it in the capacity of seeking a declaratory judgment.

This Court declared the rights of our clients with regard to the activities undertaken by the South Carolina Department of Disabilities and Special Needs, especially as it applies to the promulgation of documents that purport to establish policy that applies to our clients.

As you're aware --

THE COURT: Let me ask you, just to begin with, is there a standing issue?

MR. HAMM: There is -- a question has been raised. I'll be happy to go through that immediately. We are raising a public health question.

The plaintiff in this matter is denominated under both state and federal statute as having responsibility to represent individuals with disabilities or agencies that undertake to make determination about their rights.

We are raising the question -- and the Supreme Court, I think, has made clear -- that when it is a matter of public health and policy, which I believe this is, and since we do not seek damages, we simply seek a declaration as to the application of law, we think that protection and advocacy certainly, and the clients we represent served by DDSN, have the right for a declaration by this court as to whether or not the APA applies to directing some policies issued by DDSN.

I'm reminded of the phrase capable of repetition but the State being reviewed, I think that we bring before this court individuals served by DDSN, individuals who have been impacted by decisions made under directives not enacted under the terms of the Administrative Procedures Act.

I think that there would be no better individuals than those to be heard on the fundamental policy question as to whether there is some exception under the Administrative Procedures Act that might apply to DDSN and allow them to regulate as they refer to it by other means.

THE COURT: All right.

MR. HAMM: May I proceed?

THE COURT: Certainly.

MR. HAMM: Just as a matter of information, Your Honor, we have -- received an order -- our individual clients because of their medical conditions are proceeding under an order signed in 2007.

They do so anonymously for purposes of protecting their identity as they seek a declaration under the statute.

THE COURT: All right.

MR. HAMM: As I have indicated, Your Honor -- as I have indicated, Your Honor, there is no dispute that DDSN enacts what they refer to as directives that establish policy of DDSN, establish requirements upon our clients, and they do so by a term they use, refer to, as other means rather than the provisions of the Administrative Procedures Act.

We respectfully submit that this matter now before the court is of substantial public interest when you have a State agency saying we may proceed notwithstanding the procedures enunciated under the Administrative Procedures Act in terms of establishing policy through the enactment of regulation.

I know this Court has addressed the Administrative Procedures Act before, but I would simply note the

following: South Carolina law establishes that a regulation under the Administrative Procedures Act means each agency statement of general public applicability that implements or prescribes law or policy or practice requirements of any agency.

In this case, Your Honor, I'm going to be making reference to excerpts from the depositions demonstrating there is no material question of fact.

It is simply whether or not the construction of law that DDSN applies to their activities is consistent with their own statutory authority and indeed consistent with the requirements of the Administrative Procedures Act which is a collaborating statute.

By that I mean, Your Honor, the Administrative Procedures Act was a legislation adopted by the General Assembly so that there would be uniformity in the actions taken by state agencies as they go on the business of implementing their statutory responsibilities.

The Administrative Procedures Act applies to conduct of hearings. It applies to the process by which a regulation might be adopted, and as you're likely aware, Your Honor, in order to implement a regulation, you give notice that you're intending and considering to promulgate a regulation in a certain area.

You allow for public comment. The agency takes those

into consideration. They then send them to the General Assembly for their review and possible public hearing whatever pronouncement of policy they are seeking to implement.

Then the General Assembly determines whether or not they are going to agree to that regulation or send it back and ask for certain amendments. As you're aware, the General Assembly themselves cannot amend a regulation. They must send it back for action by the agency.

Notably, in this case, Your Honor, that process does not take place. For example, one of the statutory themes of considering the intent of legislation is what does it say.

There is no question that in this particular case -- and I'm going to use a specific example in order to make it clear -- I cite to section 44-20-220, that's Title 44. It's the health provisions that apply to DDSN and starts off and says, "The commission shall determine the policy and" --

THE COURT: Give me the cite again. Give me the cite again.

MR. HAMM: Pardon me?

THE COURT: Let me have your cite again.

MR. HAMM: Yes, sir, section 44-20-220.

THE COURT: Got it.

MR. HAMM: The Commission shall determine the policy and promulgate regulations governing the operation of the department and what personal staff -- personnel. Notwithstanding that guidance, DDSN has made certain determinations.

The regulations somehow only apply to their inner operations and do not apply to sort of their public persona in the delivery of services, but it again -- to make it clear in terms of a statute, there is a specific statute I'd like to start with.

It makes, I think, crystal clear to the Court, DDSN shall promulgate regulations regarding obtaining informed consent and to protect the dignity of the individual shall promulgate -- the Supreme Court has already told you and me that the term "shall" is mandatory. "May" is a permissive term, shall promulgate regulations to obtain informed consent.

It's clear. It is concise. There is no ambiguity for you to define, Your Honor. Has DDSN ever promulgated a regulation to comply with that very clear and expressed mandate? Unfortunately, Your Honor, the answer is no.

So that is one of many examples of why we stand before you today and ask for a declaration of rights under the terms of the statutes that DDS [sic] seeks to enforce.

We are not here -- I want to be very clear here in

the terms of the status of this case. We're not seeking damages. We are not claiming ill will. We are simply confronting a dilemma for which no clear answer exists.

DDSN respectfully tells us we don't have to comply with the Administrative Procedures Act. We do it and regulate by other means in terms of directives.

Now, one of the major problems of the directives -- and I'm going to ask the Court to take judicial notice of some information regarding the availability of internet in South Carolina, and why would I ask the Court to do that?

Well, as you know, under the Administrative Procedures Act, you make your filing of your administrative rules with the State Register.

You're on notice, subject to review, possible hearings and so forth. DDSN does not follow that procedure. They create and establish directives and then pronounce them and issue them on an internet website.

THE COURT: They are published?

MR. HAMM: They are not published. They are put on an internet website, and the -- and the reason I want to raise that point, number one, that is a conflict with the Administrative Procedures Act that talks about placing them in the State Register and the process is followed.

DDSN has determined they do not have to have public hearings. They say they can disseminate that by the

internet and then most disturbing to me, Your Honor, is they have conceded that they believe that they can change those directives any time they deem appropriate which is different than a regulation.

A regulation constitutes the established policy adopted by the General Assembly -- at least approved by the General Assembly. It takes further legislative action to change that, and unfortunately, that does not take place here.

Why do I -- I want to go back to why I made reference to the internet, Your Honor. Again, we are not attacking the individuals at DDSN. We are just confronting a dilemma of substantial proportion.

I would ask the Court to take judicial notice of a website called Connect South Carolina. It is simply a compilation of data regarding the availability of internet services in South Carolina.

I think that this Court would not be surprised, South Carolina does note rank very high on the list of total citizens that have the availability of internet in South Carolina.

I think that's probably, in fairness, a function of our rural composition of our state and our citizens, but my point being that utilizing a website when large portions of our citizens don't have either access to the

internet -- and it's not available -- calls into question the due process availability to put those citizens on notice that a directive has been issued.

In the memo that I submitted to Your Honor, which I will not repeat given the time constraints, we pointed out the very great difficulty of trying to dig down through the directives issued by DDSN.

We made reference to the issue of asperger's diagnosis and some other matters, and we pointed out how extraordinarily difficult it is to find information. And ultimately, if you dig long enough, based on our best understanding, you only find it by going and looking for providers.

It doesn't address how you find that information within the website. That is contrary, again, of course, to what you must do in purposes of the State Register, a listing of your regulations and what they apply to.

I also made reference to the fact that DDSN asserts and tells us, "Well, Mr. Hamm, we don't think we have to implement regulations for anything other than sort of our internal operations, and we can implement our statutes by virtue of these directives."

I had the opportunity to take the deposition of Dr. Lacy who at the time was the individual at the Department of DSN that actually wrote, reviewed, and

issued directives for DDSN.

One of the things that I found most troubling and I hope will cause this Court to carefully consider the position we're taking is the fact that in discovery, we asked, "We would like to see the DDS board minutes to show where the board decided as a matter of policy it was not going to follow the requirements of the Administrative Procedures Act. Instead, we're going to issue these directives and put them out on the website. They can change them as they deem appropriate."

The answer we received was, "There is no reference in any minutes where the board considered the issue of not adopting policy questions under the definition of regulation under the APA and instead decided to issue directives."

Well, that raises immediately, Your Honor, well, where is the position now being presented to this court that it can proceed as a matter of policy to use directives rather than the APA when the Commission itself who by statute has the sole authority to establish policy has never reviewed, considered invoking it up one way or another.

Now, Dr. Lacy in her deposition -- and what I'd like to now do is turn to the excerpts -- and I will submit them to the Court given the time, Your Honor, rather than

-- because I am very conscious of the passage of time, so what I --

THE COURT: Are you saying that directives are not even considered by the board?

MR. HAMM: No. There is no procedure by which a directive that has been established is, in fact, reviewed and approved by the board before it's disseminated.

THE COURT: Okay.

MR. HAMM: The test -- I'm trying to be very fair in my testimony. I think Dr. Lacy basically said, "Well, I know what I'm doing. It's the Court's -- what the board has in mind."

The only trouble I have with that, it's hard to specifically identify -- there's nothing in the minutes that comports to that. Now, I don't question that maybe there's some sort of understanding, but when you're talking about matters that rise to the level of policy -- there's no question certainly in my mind, the issues you're going to decide, does the establishment of policies following a vehicle other than a regulation under the Administrative Procedures Act, is that law?

Well, given the time, they jumped to 2011. In 2011, the DDS staff made the determination that a certain individual did not qualify for a Medicaid waiver to obtain certain services. I won't go into all the details.

That was appealed, and it ultimately went to the South Carolina Supreme Court. The South Carolina Supreme Court expressly stated that anything other than a regulation was not a lawful pronouncement of policy and was not enforceable. That was 2011.

Has DDS, since the South Carolina Supreme Court has directly expressed one of their directives, turned around and said, "All right. We've heard from the Supreme Court. We need to get a regulation in place"?

They have done nothing. That directive is still posted on their website as of about 10:30 this morning when I checked just to make sure it had not been changed.

I would hope the Court would recognize that that raises a legitimate question on the part of our clients that they can't rely on a directive because it can be changed, and not withstanding the fact that the Supreme Court has directly addressed one of their directives and said it's not embodied in the form of a regulation adopted pursuant to the APA. It is not enforceable.

THE COURT: You cited that case?

MR. HAMM: I have cited that case, and if you'll give me a second, I'll...

THE COURT: Just tell me what it is.

MR. HAMM: My mind is racing as I am looking at the time, Your Honor.

MR. WOODINGTON: It's Doe v. DHHS, I think.

MR. HAMM: Yes; that's right. That is correct. It's a 2011 South Carolina Supreme Court case.

Okay. So what do we want --

THE COURT: What is that cite? Does somebody have it?

MS. HILL: Yes.

MR. WOODINGTON: It's Supreme Court, 2011; Supreme Court, South Carolina, 2011.

MR. HAMM: Oh, here. Your Honor, I'll read the citation to you, Your Honor.

THE COURT: So the record has it, as well.

MR. HAMM: Your Honor, it would be cited as 398 SC 62, 727 S.E. 2d 605.

THE COURT: Okay. Thank you.

MR. HAMM: Also, in the course of our discovery and depositions, we took the deposition of an individual who is still a sitting board member, Ms. McPherson.

She stated her frustration that, in fact, they had not adopted policy positions pursuant to the APA and basically said in her testimony that, well, that's the position, and nobody seems to want to change it.

I think that's probably fair testimony in terms of her concern when asked, "Do you think it ought to be done in the form of a regulation?"

Her answer was yes, but in fairness, she was one member of the board. We also heard the testimony of Dr. Larson.

THE COURT: All right.

MR. HAMM: Vaughn, Dr. Vaughn, and this I found both interesting and troubling: Both Dr. Lacy, the guru at the time on policy, and Dr. Vaughn, a member of the board basically said, "Well, nobody likes regulation."

Dr. Lacy said, "Well, it's not very efficient. You can't get the General Assembly to take the action. It takes too long, and Dr. Vaughn basically suggests, "Well, nobody likes regulations, and we move quicker by issuing directives."

Again -- and he conceded in his deposition, as did Dr. Lacy, that there was no statutory authority for this -- utilizing this, quote, other means of issuing policies other than by regulations.

The main -- the main thrust of those positions was it's just not efficient, and it takes too long. Well, our position is, Your Honor, that DSN -- DDSN is a creature of its legislative authority.

The General Assembly has created no exception under the Administrative Procedures Act for purposes of regulation, and I would note and concede that counsel has cited some cases where there have been some exceptions to

the Administrative Procedures Act; the Coastal Zone Commission, one that comes to my mind because of other provisions, but no such case law or support exists for the position offered by DDSN.

The scope that we seek, Your Honor, so that you'll understand why this is so important to our clients, goes to the question of basic questions. Your daughter has a disability. You want to know whether she is eligible to receive services, a substantial and reasonable request. There is no regulation that will tell you the answer to that.

There is no regulation that described a hearing process. There is no regulation that applies, what do you do when DDSN issues an order and says, "I'm sorry, Judge. Your daughter does not qualify." What do you do then? There is no regulation enforceable. Remember, it has to be a regulation, according to the Supreme Court, for it to be enforceable as a matter of law.

There is no regulation about, "Well, you're on a waiting list."

"Well, how do I get off the waiting list? Is there a regulation that clarifies that?" No. Is there a regulation that talks about the question of eligibility for residential services or the operation of residential programs?

Now, one that I think is -- because it was referenced in counsel's brief, Well, Mr. Hamm can't complain about obtaining consent because for purposes of research on human subjects -- and we're going -- we're supposed to know the unknown.

Even though the statute requires regulations, research on human subjects is a very specific area by which our clients deserve the utmost protection, and before they might be allowed or coerced or whatever to participate in a program, there ought to be a regulation that establishes the very clear enforceable standards that either apply or don't apply.

So we have a number of statutes that specifically direct them -- direct them, that being the DDSN, to shell promulgated regulations to obtain informed consent to protect the dignity of the individual.

THE COURT: All right. I've looked at those.

MR. HAMM: Which is 44-26-180.

THE COURT: I've looked at them.

MR. HAMM: Okay. So --

THE COURT: Let me hear from Mr. Woodington.

MR. HAMM: I just -- I'm done.

THE COURT: I think I -- I think I understand your issues.

MR. HAMM: I'm not going anywhere. I'll be right

here, Your Honor.

THE COURT: Mr. Woodington?

MR. WOODINGTON: Your Honor, it sounds as if you do understand the issues, and I'll try to be as short as possible within the time constraints.

THE COURT: Well, it seems that the issue is whether or not the DDSN comes under the purview of the APA and whether they are subject to, as 44-20-220 says, promulgation of regulations.

MR. WOODINGTON: And --

THE COURT: Governing the operation of the agency so that --

MR. WOODINGTON: And just what Your Honor said at the outset, once we have a real live plaintiff of any kind whatsoever, personal, individual or institutional that has standing to argue about this, these matters -- they started out in 2007, six years ago, with the 11 plaintiffs -- and they still have all 11 as far as I know.

It's very diverse factual circumstances as alleged in the complaint. We initially filed a motion to dismiss arguing that as a matter of law, we didn't have to do the regulations which, of course, admitted at the time everything that was in the complaint.

We also filed a motion to make more definite and certain by having the names of the plaintiffs disclosed to

us. That was objected to and fought. Judge Childs denied our motion to compel, in effect, saying, "You can't find out the identity the those 11 people."

I'm not going to play games. Obviously, we can figure out who some of those are. Officially speaking, in terms of putting this case in Court on the record, there was nothing in the record to show who these people are. So we denied every factual allegation in the complaint for lack of information.

THE COURT: How about the PNA itself?

MR. WOODINGTON: Well, I'll get to the PNA itself in just a minute. I would say since that there's nothing in the record about the individuals, that's just off the table as far as I understand it. Then we turn to the PNA itself.

When -- we've cited some federal cases to the effect that we didn't have a PNA organization. They're all over the country. They're all part of the bigger statute. They have standing to press the claims of individuals -- or at least it's been held that they have standing -- if they have an individual who has been injured, who suffered an injury.

They have standing to appear on their behalf, so in some cases holding. But if they're don't have that -- and they do not have that in this case. There is no proof of

any individual that has been injured or suffered or even allegedly suffered.

Then they have to show -- in order to have standing, they have to show the injury to the agency itself, to the entity itself. Now, where is the proof of the harm to the entity itself? I would submit that the only place you can even look for such a thing is in that Prevost affidavit that they handed up a while ago.

If you look in that, you'll find nothing. You'll find a conclusory allegation on -- in paragraph seven that just says -- I'll read it. "PNA has been injured by DDSN's failure to promulgate regulations."

Well, that -- that doesn't make it on a summary judgment context. It's just alleged -- assert that you've been injured, not say why.

In the paragraph preceding that, paragraph seven, they do purport to say how they have been injured but only because, as Mr. Hamm just said, they find the directives that are online difficult to navigate.

That is not an APA cause of action. That doesn't state a claim for improper failure to promulgate regulations. Nobody -- I'm dealing with this decision, but nobody can navigate the code of federal regulations but nobody would argue that they're not valid for what they are.

Lord knows there are plenty of things in the federal register that aren't regulated. There is no way to navigate those either. I mean, really, again, some of it is procedure. That's all they have. The -- they -- the only harm that the agency has alleged is that they have to look around to find it in the records.

In fact, I call Your Honor's attention to Exhibit 34, Plaintiff's Exhibit, the most recent Exhibit 34 that lists all of the directives. They're not alphabetical, but they all -- they all have names on them. I can -- I can hand up my copy to the Court.

THE COURT: I got it.

MR. WOODINGTON: And, you know, they're all there. Whether they're -- whether they're difficult to navigate or not -- I would say they're rather easy to navigate at this point.

Whether the internet is available in all the counties in South Carolina, which is really neither here nor there, still doesn't go to the issue of whether there is a statutory or other requirement in the agency to promulgate regulations as opposed to directives.

Your Honor, I'd ask whether the Commission had acted on these -- and I think the answer to that -- I don't have all of these in front of me, but at the end of that, on the last page of their exhibit 34, we resubmitted

something similar just a while ago, just a cover sheet handed up.

There are five DDSN Commission policies, and I believe if you look at that, they're all 800 -- numbered 800 something. If you look at that, I think -- I can't swear to it because I don't have it in front of me right now -- and you will find that there is -- that that expressed a policy of what would be done at staff level as opposed to at the Commission level.

If I'm wrong about that, I'll -- I would take it back if I have to, but that's my understanding of what's on there. But anyway --

THE COURT: Do you think one of those is a blanket authority to impose directives? Or adopt directives? Is that what you're saying?

MR. WOODINGTON: What Ms. Vanderbilt -- what Ms. Vanderbilt says, as the director of the agency, what her parameters are for doing directives.

THE COURT: All right.

MR. WOODINGTON: Either way, though, I mean, again, the issue is, is there a statute anywhere that requires the regulations to be promulgated.

I would submit that -- well, you already mentioned that -- the informed consent provision. That -- I don't think they -- there's no allegation to complain to

somebody affected by that, much less PNA.

I'd like to hand up, if I may -- this is just a sort of annotated copy of the statute, and it just breaks it down, 44-20-220.

THE COURT: I'm looking at it.

MR. WOODINGTON: The only thing that does is separate out into paragraphs and does some highlighting. You'll see there's two different parts of it. The first part is the Commission shall determine the policy and promulgated regulations governing the operation of the department and the employment of professional staff and personnel.

It's been our position from day one that that's internal. The operation of the department and employment staff and personnel just has -- it -- it has an internal flavor about it, especially when you look at the second paragraph that's highlighted at the bottom which says the Commission is authorized to -- as opposed to is required or mandated to -- promulgate regulations to carry out the provisions of this chapter and other laws related to item E, related disabilities, head injuries, et cetera. So you have got two categories: The ones they have to do, and you have the ones that they're permitted to do.

I would submit that everything that Mr. Hamm is complaining about is in that second category, that it's permissive. But again, I'm not even sure Your Honor needs

to get there because who has standing?

The Supreme Court itself, the US has said and our court has kindly agreed with us, let's just show injury to yourself. The Court can't consider just sort of a roving order of review to make sure the government is complying with everything that it may or may not have to comply with.

I don't even know what an order on behalf of the plaintiffs would look like because this is so vague and wide ranging concerning the types of regulations they want to see put in place or where within. I -- I -- I just am at a loss to understand that.

I think I covered all my points, Your Honor. Well, I have a couple more if you'll bear with me.

(Pause).

I did want to mention the binding Moore argument (phonetic), which is a very recent argument they made. The idea that if an agency is going to establish rules of general applicability that establish binding norms, it has to do so by regulation.

That's where the lack of standing really comes from the roost because how -- what did the agency do that was binding, and how did that hurt somebody? We don't know. We just don't know from the allegations in the complaint. Nothing has been done to flush that out. So that issue,

at a minimum, should go out for a lack of standing, as well.

A couple of other things Mr. Hamm and Ms. Hill will have had a lot of fun with the sentence that I wrote years ago, and they keep asking -- acting as if the agency said it in a deposition.

I said that the plaintiffs would prefer state agency action to occur by other means, and they keep using the words "other means" over and over again. It's on page one. That's my first brief in 2008.

Well, I didn't say regulate by other means. I said take action by other means. Again, for the questions of the profession, because if there's no requirement in the statute that they promulgate regulations, they don't have to promulgate regulations.

A couple of other points quickly: One thing is you -- there was a body of case law that says if you're alleging an absence of regulations, you have to show prejudice to yourself. There's not -- there are no South Carolina cases on that, but there are cases on there.

You can't just come in and say, "Whoa, there's no regulations. I win." You have to show that somehow or another that prejudiced you. That's where this gets fact intensity.

You need a plaintiff -- every case they cite on

binding norms, for example, had a real claimant and was arguing this in a real case or a real appellant or what have you from agency to action.

They mention that the Doe v. HHS case and said -- as paraphrased by Mr. Hamm, it said well, if you have policy without a regulation, it doesn't fly. What he didn't mention is that the court found that there was a regulation in place and -- it was my case. I know what it held, but we were arguing that that regulation didn't apply to the particular subject matter at hand and instead a policy covering that subject matter at hand.

The Supreme Court has really, too, said no, the regulation applies to this subject matter, and since the regulation applies, your policy is -- is -- is no good. But it didn't stand for the proposition -- really, it didn't hold no regulation, no good. It just said no regulation -- a policy can't follow a regulation. Finally, we've heard a number of things about the hearing process and so forth and lack of information about that.

The APA governs hearings and provides for processes for hearings from adverse agency action, and most of these actions anyway are Medicaid. They're governed by Medicaid, although that's not really in the record.

I would submit, Your Honor, that our summary judgment should be granted. The motion should be granted. Theirs

should be denied, and if they want to do this, they can come back and try again in another -- in another fashion in light of this hearing.

Oh, one other thing. I apologize. Public importance. Those cases -- and I believe Your Honor has cited some of these -- not always -- not always for good but you decided some of these.

THE COURT: They all had Mr. Sloan's name on them.

MR. WOODINGTON: I would say -- the Supreme Court took me one down one time for mentioning the plaintiff. I think maybe Mr. Hamm couldn't possibly have standing because his client wasn't --

(laughter).

The Chief Justice didn't like that.

(laughter).

Any way, I mean, those basically, those typically, involve very narrow legal issues. This is -- this is for a widespread factual diverse issue and not really something that properly applies. That's all.

THE COURT: Mr. Hamm, briefly.

MR. HAMM: Briefly is all I need, Your Honor.

All I -- I can point directly to the deposition of Dr. Lacy on page 27. When I asked her about directives, she said, "The directives are the instrument used to communicate policy to DDSN, its network of providers or

customer, and their family, and the public."

I then go back to the definition of regulation that talks about adoption of policy, and the DDS individual presented to us to address and have authority to speak on it expressly said that they use directives to establish policy rather than the Administrative Procedures Act.

I now go to the exhibit he just handed you. I would note the very first line, "The Commission shall determine the policy and promulgate regulations." It could not be any clearer: Determine the policy and promulgate regulations.

We have the sworn testimony of Dr. Lacy. That's not how they do it. That is not consistent with the statute. I would note that -- materials at the bottom of the page. Look at the last sentence, Your Honor: The Commission shall consult with the Advisory Committee of the division for which the regulation shall apply.

Well, guess what. They never -- they said, "We don't have to do that because we didn't comply. We didn't create the Advisory Committee."

The General Assembly in two different areas makes clear that the vehicle by which you establish and enforce policy is the adoption of the Administrative Procedures Act.

I would also note, Your Honor, with regard to the

pleadings in our complaint in paragraph 38 -- so we're very clear. I want to -- I don't want to make an assertion broader than the record.

In paragraph 38, we noted that they have promulgated only five regulations prior -- all prior, 202, and then licensed requirement facilities, various things. None of those addressed the issue of eligibility standards for being accepted or not accepted or being removed from a program.

The very clear one that I've already pointed out to the Court that expressly says, "By the General Assembly, you shall adopt a regulation for purposes of establishing consent" because you need to do that to maintain human dignity.

Now, either the General Assembly meant that or they didn't, but you heard nothing from esteemed counsel that says, "Well, yeah. It does say that, and yeah, we didn't do it." But just because the statute says we shall promulgate regulations to deal with informed consent to maintain human dignity, nowhere does that provide for other means.

I would simply conclude other means is not a phrase actually that we came up with. It was a means used by Dr. Lacy in her deposition when she told me, "No, Mr. Hamm. We don't use regulations. We use other means."

I asked her, "What are other means?"

"They're directives."

Then I asked her, "Well, can you change directives?"

"Yes."

And, in fact, she told me that the directives -- and I won't quote -- she stated, "Directives are changed frequently, and so the process used to get information from our customers and their families to other state auditors is incorporated into the document referring to directives.

So it's either we have rights under the Administrative Procedures Act. There is no contest that the directives constitute the statement of policy applicable to the individuals that they serve.

There is no question they have not complied with the notice and requirements of regulation. We recognize they don't like it. We recognize that they say it's a pain in the butt and it takes too long, both of which may be true, but that does not alter, I think, the Court's obligation to state that the law requires that you comply with the decisions of the General Assembly because the Administrative Procedures Act is just not something you comply with sometimes and others.

I finished on the following: Counsel, wonderful counsel made reference, well, we complied with the APA

hearings and regs and don't have to do that.

So they comply with the APA and portions of it. They don't comply with other portions. How are we supposed to know the difference? We simply say, Your Honor, respectfully declare the rights that we have them or we don't, but declare the rights so we will know.

We think that's appropriate. We think we have standing, and the failure to follow the Administrative Procedures Act, in fact, is a continuing injury that gives our client standing to be heard by this Court.

This is capable of repetition escaping review. You have the opportunity and the authority to issue an order declaring our rights, and we would respectfully request that you do so.

THE COURT: Just a quick question to you, Mr. Hamm. The DDSN policies that are part of this file --

MR. HAMM: Yes.

THE COURT: -- Exhibit number 34.

MR. HAMM: That's the list of directives.

THE COURT: Are you suggesting that all of these should now or should have been submitted to the legislature for a review?

MR. HAMM: Yes, but this Court --

THE COURT: That's all I need to know.

MR. HAMM: To be very clear, we are not asking -- we

are asking the Court to state that the law requires the agency to comply with the APA.

We can get into the weeds of what is covered and not. Our purpose is you need to resolve this question where we say we have rights under the APA. DDSN respectfully tells us no, you don't have rights under the APA. Tell us who is right. Only then can we proceed to properly vindicate the rights of our clients.

THE COURT: All right. Thank you very much.

MR. HAMM: Thank you.

THE COURT: How much time do you need to propose orders?

MR. HAMM: Thirty days. Would that be all right?

THE COURT: Sure.

MR. HAMM: I have got two trials coming up.

THE COURT: Usually just a matter of reconfiguring your memorandum in the order form, but I do need something.

MR. WOODINGTON: Whatever, 30. If he needs 30 days, 30 days is fine.

MR. HAMM: If you'd like to have it sooner than that, Your Honor, just say so. I'll change my schedule.

THE COURT: There is no --

MR. HAMM: Well, this had been going on for a long time. The conduct by which we have -- I will do it by the

end of the month.

THE COURT: That doesn't answer my question. Thirty days is not going to --

MR. HAMM: By the end of the month, Your Honor. Last day of the month.

THE COURT: Thirty days. I'll give you a couple of extra days.

MR. HAMM: You are kind, Your Honor.

Your Honor, I would like to -- I have cited in my brief and made reference -- just to ease the Court, obviously, we'll put the entire transcripts into the record, but I do think these are helpful to the Court in terms of --

THE COURT: Are they helpful to your memorandum?

MR. HAMM: Yes. I made reference to it in my memorandum, but I don't believe these pages were attached. They are attached, excuse me.

THE COURT: It appears that they are.

MR. HAMM: Thank you for that elucidation of facts about my own memorandum, Your Honor. I appreciate it.

THE COURT: I did review it, and I don't know what you have in your hand but I --

MR. HAMM: The same thing. I proceeded under the impression that we had not made that available to you, Your Honor.

THE COURT: All right. Thank you very much, counsel.

MR. HAMM: Thank you, Your Honor.

MR. WOODINGTON: Thank you.

(Whereupon, the proceedings were concluded.)

CERTIFICATE OF REPORTER:

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

I, Karen Ambroziak, Official Court Reporter for the 5th Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for Richland County, South Carolina, on the 6th day of August, 2013.

March 26, 2014

Karen Ambroziak

Karen Ambroziak, RPR
Circuit Court Reporter

STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS
COUNTY OF RICHLAND
PROTECTION AND ADVOCACY
FOR THE PEOPLE WITH
DISABILITIES, INC., ET. AL,
Plaintiffs,
vs. CASE NO. 07-CP-40-2187
SOUTH CAROLINA DEPARTMENT
OF DIABILITIES AND SPECIAL
NEEDS, ET. AL,
Defendants.

DEPOSITION OF: KATHI M. LACY

DATE: July 9, 2009

TIME: 9:30 a.m.

LOCATION: Law Offices of
Richardson, Plowden & Robinson
1900 Barnwell Street
Columbia, SC

TAKEN BY: Counsel for the Plaintiff

REPORTED BY: L. Skyler Hare,
Court Reporter

A. WILLIAM ROBERTS, JR., & ASSOCIATES

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& Advocacy for People with
Disabilities
Nancy McCormick, with Protection
& Advocacy for People with
Disabilities

(INDEX AT REAR OF TRANSCRIPT)

STIPULATION

It is stipulated by and among Counsel that this deposition is being taken in accordance with the South Carolina Rules of Civil Procedure, Rule 30; that all objections as to Notice of this deposition are hereby waived; that all objections except as to form are reserved until the time of trial; and that the deponent waives reading and signing of this deposition.

* * * * * * * * * * * *

KATHI M. LACY,

being first duly sworn, testified as follows:

EXAMINATION

BY MR. HAMM:

Q. Good morning. My name is Steve Hamm and I, along with my law partner, Jo Anne Wessinger Hill, who will be in here in just a moment unless she decides to give birth in the next few minutes, which anything is possible.

MR. WOODINGTON: This is off the record.

(Off-the-record conference.)

MR. HAMM: For purposes of the record, Mr. Woodington, we're going to reserve all objections except to form and then --

MR. WOODINGTON: Correct.

BY MR. HAMM:

Q. Okay. And what that means is that I may ask you a question and your counsel may say, object to form, that you still have an obligation to answer truthfully to the questions proposed and we'll argue later as to whether or not the form is an issue in the Courts.

I am aware that you have had your deposition taken because I read a recent deposition that you took within, I guess, the last month or so.

MR. WOODINGTON: That the one from Mimms case?

MR. HAMM: Yes, yes.

BY MR. HAMM:

Q. I just wanted to get a sense of who it was I might be talking to today. So good morning and welcome, by the way.

A. Thank you.

Q. Let me maybe walk through this procedure. I want to make sure you and I are clear on how I want to proceed this morning. Obviously, you have counsel that I hold in very high regard. I have known that character for a long time and I think he actually knows something about the law.

That's as far as I'll say on the record but you have good counsel and --

MR. WOODINGTON: Remember you're under oath.

MR. HAMM: I know, I know. I just was thinking the same thing but -- so I won't go any farther.

MR. WOODINGTON: Okay.

BY MR. HAMM:

Q. But I do want to welcome you and I do hold your counsel in very high regard.

All right. I'm going to ask a series of question and your obligation, as I know that you know, is to testify truthfully to the best of your ability. You do understand that?

A. Yes.

Q. I may ask a question in which you go, Mr. Hamm, and you're welcome to call me Steve, what's the appropriate -- I want you -- or Dr. Lacy, would you like to be referred to as Dr. Lacy? I'd be very happy to do that in the course of this --

A. Kathi is fine.

Q. All right. And you're certainly welcome to reference to me as Steve, Mr. Hamm, whatever you're comfortable with. I do want to be

respectful to you and address you in the way you deem appropriate. So either Dr. Lacy or Kathi would illicit a response?

A. Yes.

Q. Okay. Good.

To the extent I ask a question and you don't understand it, I would ask that you tell me that. To the extent I ask a question and you answer it, I'm going to assume that you understood the question and that your answer was attempting to be responsive to it.

So to the extent that you have any doubt or whatever, I respectfully invite you to say, Steve, you need to say that again or ask it a different way or whatever, and I will endeavor to do that.

A. Okay.

Q. I'm going to try to move through this relatively quickly. This is not intended -- we're not here to have an endurance contest or and this deposition is not in any way intended to be a harassment of either you or the agency that you work with. It's simply an opportunity for the plaintiffs in this case to have a better understanding of what someone in your position, the answers would be so we

better fill out the dispute that has been filed.

To the extent that you need to take a break at any time, you simply need to tell me and we'll certainly do that. The restrooms are out that door and to the right. You now know where the coffee machine is and the water. And to the extent that you need a refill or a change, you simply need to tell me.

To the extent that we take a break, you are not to discuss the questions or answers that you and I have been going through during the course of the deposition. Do you understand that?

A. Yes.

Q. As you're aware, we have a court reporter and that's simply the device by which we record for the judicial process, answers to questions. And your answers may or may not be involved in decisions that the Court may be asked to address in the coming months and years.

To the extent that I ask you a question, I need you to answer verbally. The court reporter can't properly record an answer unless you verbalize an answer. So shaking your head, while I might clearly understand what you're saying, when you look at a deposition transcript would be unknown

what your answer was. So if you will verbalize and answer as best you can to any question that I give to you.

Are you under -- are you taking any drugs or medications that might affect your ability to clearly think through a question propounded to you and provide a response to me?

A. No.

Q. Okay. Is there any reason that you can't tell the full and complete truth as you understand it during the course of this deposition today?

A. No.

Q. Okay. Let me go back to something that Mr. Woodington and I were just discussing. He may -- I may ask you a question and he may say, object to form. I want to make sure that we're clear. He can do that but you still have an obligation to answer the question as best you're able.

A. Right.

Q. Okay.

MR. WOODINGTON: And in the unlikely event you try to go into privileged material, I would address that accordingly.

BY MR. HAMM:

Q. Okay. And just so on the record, Mr. Woodington and I have an understanding of that. He's talking about conversations that you may have had with Mr. Woodington in preparing for this deposition or legal advice that you may have received during the course of this deposition.

I will not intentionally be asking you to divulge any privileged information. And to the extent that Mr. Woodington thinks that I have asked that question, we'll address it but I understand the issue of the privilege, I respect it and I do not believe that that's going to be a problem. But that doesn't mean that he might interpret a question in such a way.

All right. Have any questions just about the process that we're about to go through?

A. No.

Q. Okay. And I am aware -- like I say, I read a deposition that you did about a month ago. Had you done depositions before that one?

A. Maybe one or two.

Q. Okay. Okay. For the record, please tell me your complete full name and spelling. I think I know what it is but for the record, I want

to make sure.

A. It's Kathi, K-A-T-H-I, Kelly, K-E-L-L-Y, Lacy, L-A-C-Y.

Q. All right. Have you ever been known by any other names?

A. Uh-huh, yes.

Q. And that would be?

A. Kathi Michelle Kelly. It's my maiden name.

Q. Okay.

A. And Kathi Michelle Peeples was a former marriage. That should be it.

Q. All right. Was that former marriage here in South Carolina?

A. Got married in North Carolina.

Q. Okay. You're currently married?

A. Yes.

Q. And your husband's name is?

A. Benjamin Rice Lacy.

Q. Where do you live?

A. Columbia.

Q. Based on the answers that you've just given me, you had a previous marriage?

A. Yes, sir.

Q. All right. And where -- where did that

divorce take place?

A. In South Carolina.

Q. And when was that?

A. 1988 -- '88.

Q. Okay. You have any children?

A. I have a daughter.

Q. All right. How old is she?

A. 5.

Q. 5?

A. Yes.

Q. Well, then, I don't need to worry about her showing up on a jury somewhere.

A. No.

Q. Okay. Have any other children?

A. No.

Q. And let's -- I want to next go into your -- I was talking to my mother -- I was just about to ask you when you were born and my mother -- I told my mom, who's 84, I was getting ready to have a deposition, what kind of things do you ask? Well, mom, I'll ask about their name, ask about their background or previous marriages because I'm trying to have a sense of who else is out there and I would ask them when they were born and my mother was horrified. But I'm going to ask anyway. You were

born when?

A.

Q. And where were you born?

A. Sacramento, California.

Q. I was born in Los Angeles.

What is your Social Security number?

A.

Q. I recognize that that is an important and private piece of information and it is -- I ask that question simply because there's times when someone tells someone that they're a certain somebody and it turned out that they weren't. So I'm just wanting you to know that that is not something that will be disseminated in this proceedings. I'm telling you that because my mother wanted to know. So I just thought, well --

A. Okay.

Q. -- if my mom wanted to know, maybe you might want to know too.

Okay. In terms of where you live now, is that -- how long have you lived where you live?

A. About 11 years.

Q. Okay. And do you own it, rent it?

A. Own.

Q. Where is it you live?

A. The address?

Q. You can give me a street number and county, that will be fine.

A. in Richland County.

Q. Any previous residences here in South Carolina other than this one?

A. Yes.

Q. Okay. And where was that?

A. Laurens Street in Richland County.

Q. Do you have any -- other than your husband and your 5-year-old daughter, do you have any other relatives that live in Richland County?

A. No.

Q. Do you have any brothers or sisters that live in South Carolina?

A. No.

Q. Do you have any brothers and sister, period?

A. Yes.

Q. And where are they?

A. California.

Q. Okay.

A. And Washington State.

Q. Okay. Now, I want to go through where did you graduate from high school?

A. Colorado Springs. It's called Air Academy High School.

Q. Colorado Springs in Colorado?

A. Yes.

Q. All right. What year was that?

A. '82.

Q. And after high school where --

A. University of Colorado in Boulder and then University of North Carolina at Greensboro. Graduated there in 1982 -- wait, I graduated from high school in '78 -- sorry, getting confused.

Q. That's all right.

A. '82 from college --

Q. Wait a minute. Wait a minute. I'm not -- make sure I've got this down right.

A. Okay.

Q. University of Colorado at Boulder in 1982.

A. I -- I attended there in 1979.

Q. Okay. And then next -- so your first year of college was there and then apparently you went to North Carolina?

A. Correct.

Q. All right. Tell me about that. Tell me --

A. University of North Carolina at Greensboro. I graduated in '82.

Q. With a degree in?

A. Bachelor of science and nursing.

Q. Okay. And that was in 1982?

A. Right.

Q. Since I've already noted that you can be respectively referred to as Dr. Lacy, tell me about how you got to that degree.

A. I got a master's in health administration from University of South Carolina in -- probably 1993.

Q. Okay.

A. I might be off a couple years.

Q. That's fine. That's fine.

A. Okay. And then I got my doctorate degree in public health administration in 1995.

Q. Also from USC?

A. Correct.

Q. Now, do you have -- have you had any additional education or degrees beyond your Ph.D. in public health in '95?

A. No.

Q. All right. Now, let's go -- you got a BA in nursing in 1982. Should I assume that you, in

fact, served as a nurse for a period of time?

A. Right. And it's a bachelor of science, BS.

Q. BS.

A. Yes, I practiced as a license registered nurse.

Q. Where?

A. Greensboro, North Carolina.

Q. Okay. And what time period?

A. '82 to '84.

Q. And you were doing -- you were providing nursing services in a hospital for a doctor's practice?

A. In a hospital.

Q. In which hospital?

A. Moses Cone.

Q. All right. So we're now in 1984 and, apparently, you left to do -- you went somewhere else, apparently?

A. Did, moved to Columbia.

Q. Okay. So 1984 is when you came to Columbia?

A. Yes.

Q. And what were you doing when you came to Columbia?

A. I worked at the Health Department.
Q. The County Health Department, State --
A. Richland County.
Q. Richland County.
A. Yeah, Richland County Health Department.
Q. Okay.
A. I did that for less than a year.
Q. Okay.
A. And then I worked at the Health and Human Services Finance Commission as it was called then.
Q. Is that where Andy Laurent was?
A. Correct.
Q. Did you know him then?
A. Yes.
Q. I've known Andy a long time. Have high regard for him.

So, apparently, in -- you said you were at Richland County Health Department maybe a year so that gets us sometime into 1985, if I'm sort of guessing.

A. That's right, um-hum.
Q. So Health and Human Services in 1985. Then what?

A. And then in 1989 --

Q. All right.

A. -- I went to work for the Department of Mental Retardation.

Q. Okay. When you were at Health and Human Services, you were doing what?

A. I started out as a -- was in the Division of Program Integrity and I was responsible for reviewing physicians' file for Medicaid compliance.

Q. All right. Now, we're in 1989 and you're now at the Department of Mental Retardation and what are you doing?

A. I'm the medicaid coordinator and was hired to take the programs that the Department had been delivering and using a 100 percent state dollars and generating medicaid revenue from them.

Q. The multiplier effect?

A. Right.

Q. So in -- when you came to the Richland County Health Department, were your roles in the form of a nurse?

A. Correct.

Q. And then in 1985, you're now using your -- your nursing background, look at files for

medicaid compliance and then in '89 you go to the Department of Mental Retardation. You're the medicaid coordinator. I've always used the term over the years "multiplier effect," and you seem to understand what I meant.

A. Yes.

Q. That is were you're trying to get state dollars to justify additional federal dollars?

A. Trying to take the state dollars that are appropriated to the agency --

Q. Right.

A. -- and earn --

Q. Right.

A. -- medicaid.

Q. Okay. How long were you at the Department of Mental Retardation?

A. Until '93.

Q. What happened then?

A. I went to graduate school.

Q. Full time?

A. Yes.

Q. And that's when you're getting your master's in health administration.

A. That's when I'm getting my Ph.D. I was working on my master's part-time while I worked.

Q. Okay.

A. Health and Human Services.

Q. You earned -- again, going back to my previous notes, you earned your master's in '93, so because you've been, as I now hear you, you'd been working part-time on it, and then you go back to graduate school to complete your coursework to earn your Ph.D?

A. Correct.

Q. And your focus in graduate school was -- your Ph.D. is in what?

A. Public health administration.

Q. So that's sort of '93 to '95 you're getting your coursework and whatever and, I guess, your thesis done?

A. Dissertation.

Q. Right.

A. Yes.

Q. And your dissertation was in what?

A. Was evaluating the effectiveness of a private/public partnership between USC School of Medicine, DHEC and Palmetto Richland Hospital with a new clinic that they had started for children with special healthcare needs.

Q. And in your dissertation you concluded

what?

A. That the kids were -- well, that the parents were very satisfied with the clinic and that they reduced inpatient hospitalization and unnecessary emergency room visits.

Q. So your -- the evaluation you concluded that that public/private partnership was, in fact, effective?

A. Correct.

Q. Okay. We're now in 1995 and people are now able to say Dr. Lacy.

A. Uh-huh.

Q. All right. Then what?

A. I worked self-employed for a year. I did -- helped different organizations with that multiplier.

Q. Is it fair to characterize you as a, quote, consultant at that point?

A. Yes.

Q. And clients that you might have helped would include who?

A. Pine Grove School in Elgin.

Q. Is that a public school?

A. It is a private, private residential treatment facility. Primarily for children with

autism. And Planned Parenthood.

Q. All right. Who else?

A. That's it.

Q. All right. So that's -- we're still in calendar year 1995?

A. '96.

Q. Okay.

A. Moved kind of between time.

Q. Because I think I had read -- something that I read in getting ready for your deposition was that you joined DDSN in '96; is that right?

A. That's right, it was in the fall.

Q. And you joined to serve what capacity?

A. I was the Division Director for Mental Retardation.

Q. And being a Division Director for Mental Retardation required you to do what?

A. Essentially, running and ensuring that we're compliant with federal law regarding the operation of a home and community-base waiver that serves people with mental retardation. Developing service standards that the providers we contract with would need to follow.

Q. Those stands were federal standards?

A. No, they were state. They were federal

requirements and those requirements were turned into kind of like a operational manual of sort for people to know how to implement the service and what the department's expectations were and things like that.

Q. So you were the Director of Mental Retardation for what period of time?

A. Let's see, '96 to 2002.

Q. The way you said that, are you comfortable, you think that's right or you're not sure?

A. Yeah, I mean, I'm always going to be a little off. I mean, I think -- I'm trying to be as factual as possible.

Q. And I appreciate that very much.

When you joined in 1996, who was the Director of DDSN?

A. Actually came on at the same time, it was Dr. Stan Butkus.

Q. Now, did you have a prior working relationship with Dr. Butkus before you joined DDSN?

A. No.

Q. All right. So we're now into 1992, you have your Ph.D., you have been the Director of Mental Retardation, what happens --

MR. WOODINGTON: 2002.

THE WITNESS: Yeah, 2002.
MR. HAMM: Excuse me, what did I say?
THE WITNESS: That's okay.
MR. WOODINGTON: 1992.
THE WITNESS: Yeah, I was like, what?
MR. HAMM: Back in time.
THE WITNESS: Okay, so we're in 2002 and I was promoted to the Associate State Director of Policy.
BY MR. HAMM:
Q. Associate State Director. And an Associate State Director of Policy would do what?
A. Primarily responsible for the -- the directives related to how the department, you know, functions, responsibilities that it carries out, setting forth policy based on the Commission's direction, setting forth the service standards, some of the things in my previous job.
Q. Only is it fair at this point that the scope of your job is just it's now broader, it now encompasses more than mental retardation, right?
A. Yes.
Q. All right. What's next?
A. The other responsibilities that I have?
Q. Yes.

A. The other -- I'm responsible for five different divisions.

Q. What are they?

A. Mental retardation, head and spinal cord injury, autism, consumer assessment team. They are the group that determine eligibility. And quality management.

Q. Is the position that you hold now that same position that you've earned -- that you were appointed to? Who -- well, let me -- first answer that.

A. I'm in the same position.

Q. And who -- did Dr. Butkus -- who -- I don't understand --

A. Dr. Butkus, yes, hired me in the position I am in now.

Q. Okay. Now, you make -- you told me that you were responsible for directives of the department.

A. Yes.

Q. Tell me what a directive is.

A. It's comparable to policy and it describes certain expectations that the department has regarding people that we support, services that they receive, the responsibilities that providers

have.

Q. Where does the term "directive" come from?

A. It's been there since I've gotten there, so I can't --

Q. I went hunting for a statute that talked about directives, and is there one that I've just simply missed?

A. Not that I'm aware of.

Q. So the term "directive" is a term created by DDSN as a way of addressing its responsibilities?

A. Yes, I assume so.

Q. You said that -- you said that a directive was comparable to policy and I didn't exactly understand what that meant.

A. Well, I mean, in, you know, my educational experience, I mean, healthcare policy, you know, is a broad term used to describe, you know, many, many, you know, different things.

Health insurance companies use policy to communicate to their subscribers about what they cover, what their reimbursement rates are, who the providers that can render those services and things like that.

Q. And I don't say this disrespectfully, are you the policy guru for DDSN?

A. Well, it's my title.

Q. All right. And that's why I'm asking.

A. I'm not sure if I'm a guru or not but I -- but I have that title, yes.

Q. So if you have that title, do you have ownership of the creation of policy?

A. Part of the distinction between the policy directive is that the Commission is ultimately responsible, that's the Board of Directors, so to speak, to DDSN. And the Commission really sets forth the policy and the direction for the agency. And the directives are the instruments used to communicate that policy to DDSN, its network of providers, our customers, their family, the public.

Q. In terms of these directives, you've told me that they describe the expectation of DDSN for the services received by your -- you use the word "customer" and you talked about providers and so forth. Help me understand how you understand what the policy is of the Commission.

A. There are a couple ways, one is through the Code of Laws, it sets up the department. And

then the second way is through the policies that they approved.

Q. They, being the --

A. The Commission. They're called Commission policies.

Q. Again, tell me how you -- I'm trying to understand how you understand the policies approved by the Commission. Tell me how -- tell me how the process works when you have -- the Commission has a policy that you understand they have approved. Now, help me understand how it gets apparently translated into a directive; is that correct?

A. Well, we use those to write directives, to update directives, to change service models, the way, you know, people desire to receive services in the likes. So we use those as our guiding principles.

Q. So that a customer of DDSN who has concerns about either the services they are receiving or not receiving, those concerns are presented to the Commission -- are those concerns presented to the Commission?

A. Not necessarily.

Q. So you're creating directives on issues that have not been presented to the board?

MR. WOODINGTON: Object to the form.

THE WITNESS: No, I think you might be misunderstanding or I'm not clear but the directives, for example, let's say a person using your example does not like the services that they're getting, there is a directive that speaks to the process that they can use in order to voice a complaint or a concern for that concern to be remediated.

BY MR. HAMM:

Q. Okay, let's go back. Let's go back to the board. You told me a few minutes ago that the board creates the policy.

MR. WOODINGTON: For clarification, I think this is always called the Commission.

MR. HAMM: Okay.

MR. WOODINGTON: Am I right about that?

THE WITNESS: Correct.

MR. HAMM: All right. Well, then, thank you.

MR. WOODINGTON: All right.

BY MR. HAMM:

Q. The Commission creates policy?

A. The -- the Commission is a governing body that sets the direction for how the agency

operates. And they have six policies, I believe, that we use in order to create, develop, refine, modify our directives or our service standards, contracts.

Q. All right. Where do I find these six policies?

A. They're on the DDSN Web site.

Q. Where?

A. If you get to the home page, there is a icon that you'd click on about DDSN. And when you click on about DDSN, and I think that's the way it's worded, I could be off a little bit, there's a section for directives and standards.

Q. I'm going to turn my notebook around.

A. Uh-huh.

MS. HILL: Steve --

MR. HAMM: You have a copy of that?

MS. HILL: Yes.

MR. HAMM: Okay, good.

BY MR. HAMM:

Q. I'm handing you what we we'll mark as Plaintiff's Exhibit No. 1.

(PLF. EXH. No. 1, Home Page, was marked for identification.)

BY MR. HAMM:

Q. Is this what you were just referring to in your response to me, Kathi?

A. Yes.

Q. Okay. Now, just -- we're looking -- for the record, I'm going to identify that Plaintiff's Exhibit No. 1 is what?

A. The home page.

Q. It is the home page that we were just talking about. And Exhibit No. 1 is -- consists of four pages.

All right. Now, I'm providing this to you because I did not expect you to have this ingrained in your memory. Of course, you've got a Ph.D., you may have it in there anyway.

A. Well, actually, I was right about the wording so that's --

Q. Okay.

A. -- pretty good for me.

Q. Okay. And so are you now -- I'm looking on Page 104 sort of in the middle of the page where it says about DDSN and then the second listing, directives and standards, is that what you're referring to in your answer to me a moment ago?

A. Yes.

Q. So the Commission -- I apologize for referring to the board. Every agency seems to have a different way of referring to itself, which is fine. Do you attend Commission meetings?

A. Yes.

Q. Do you make presentations on policies and directives?

A. Not -- not that specific.

Q. You -- in 1996 when you joined DDSN, you joined in the same time frame that Dr. Butkus joined.

A. Yes.

Q. I understand that Dr. Butkus is not at DDSN anymore.

A. Right.

Q. And Dr. Andy Laurent is, I think, serving as an interim --

A. Yes.

Q. -- director. Is there a ongoing search for a replacement for Dr. Butkus or --

A. Yes.

Q. -- what's your best understanding? I'm not trying to --

A. Best understanding is the Commission has formed a committee to do a search for a State

Director.

Q. Now, walk me through -- you say -- do you go to every Commission meeting?

A. When I'm in town, yes.

Q. Okay.

A. Yeah.

Q. And you told me that -- at least I understood your response to suggest that you did not routinely make presentations about policy and directives; is that correct?

A. Right.

Q. Are you involved in training the members of the Commission with regard to their obligations as members of the Commission?

MR. WOODINGTON: Object to the form.

THE WITNESS: No.

BY MR. HAMM:

Q. Your best understanding is who -- who would do that?

A. The Director.

Q. Okay. But you have not -- as the Associate State Director of Policy, you have not been involved in the training of members of the Commission on policy issues?

A. No, you asked me if I was involved in

training them on their responsibilities.

Q. Right.

A. And I said no to that.

Q. Okay. All right. Is one of their responsibilities establishing policies?

A. Yes.

Q. So I was somewhat surprised to hear that you don't -- and I'm not trying to put words in your mouth -- and feel free to -- but I thought I just understood you to say, well, Steve, I don't -- I don't regularly make presentations to the Commission on directives and policies.

And all I'm just trying to understand is, well, if they're the policymakers and you're not making regular presentations, how is it that you understand that a directive is consistent with the policy established by the Commission?

A. Through the State Director.

Q. So the State Director -- he learns from the Commission and then he advises you?

A. Well, we all learn from the Commission.

Q. Right.

A. But my obligation is to perform according to my job duties and that's -- I report to the State Director.

Q. Okay. Does -- has the State Director given you any written instruments reflecting his understanding of the Commission's policy that you have converted -- I'm trying to use my words carefully -- into a directive?

A. No.

Q. So there's no formalized basis in which the policies of the Commission are in turn used to create directives?

MR. WOODINGTON: Object to the form.

THE WITNESS: There is a directive on the purpose of the directives.

BY MR. HAMM:

Q. Now, when we asked for minutes of the board, I didn't see much with regard to directives. Am I correct in understanding the directives are not specifically approved by the Commission?

A. Correct.

Q. Okay. Let me restate what I've heard to set the basis for my next question. I want to make sure I haven't misunderstood you.

You indicated that you, when you're in town, would attend a Commission meeting. How often do they meet?

A. Monthly.

Q. Okay. And where do they meet?
A. In Columbia at the office.
Q. Okay. At the office over there near Richland Memorial Hospital?
A. Right.
Q. What is that campus or facility? Does it have a name that sort of stands? I mean, is it --
A. It's like a central office --
Q. -- headquarters or whatever?
A. -- that we refer to it as.
Q. Central office, okay. So the Commission meets on a monthly basis. You may or may not be there depending on your own professional schedule and travel.
A. Right.
Q. If you were -- well, let's go backwards. When was the last Commission meeting you attended?
A. June.
Q. Okay. And before that?
A. I believe there were two in June.
Q. Okay. And you went to both of those?
A. Right.
Q. All right. And what about May?

A. As far as I can remember, I was at the May one also.

Q. Okay. Well, let me make it easier. I'm not -- going back in relatively recent time, when did you miss?

A. I missed one this year.

Q. Okay.

A. I'm not sure what month it was.

Q. Okay. And that was just simply reflection of you can't be more than one place --

A. I was on vacation.

Q. Oh, good.

A. I was on vacation.

Q. Good for you. Good for you.

So I'm very intrigued by these directives and I'm -- and you just told me that the Commission doesn't formally -- they don't -- let me rephrase. Do you have a practice of submitting the directives to the Commission for approval?

A. No.

Q. So if they're not directly approved by the Commission, who are the directives approved by?

A. The State Director.

Q. Okay.

A. And whoever originated the document.

Q. Okay. Well, how -- help me understand how it is that you as the Associate State Director of Policy would know that a directive, in fact, comported with the wishes of the Commission?

MR. WOODINGTON: Object to the form.

THE WITNESS: Through the State Director.

BY MR. HAMM:

Q. Okay. And I say this respectively so I'm not being a smart aleck. So the State Director serves as the filter for whatever the Commission is thinking. And if the State Director is happy with a directive, that's where it stops.

MR. WOODINGTON: Object to the form.

THE WITNESS: Directives are changed frequently so and the process used to get information from our customers and their families and other stakeholders is incorporated into the document. And one of the Commission policies is to ensure that we are being responsive to consumers and their family's needs.

Q. Is there a checklist or a chart that you must consult in constructing a directive?

A. Those kinds of things don't exist anywhere.

Q. So the Commission establishes policy, you report to the Director -- let me make sure I'm clear of what you're telling me. As the Associate State Director of Policy, do you have ownership of all directives so that they're consistent with whatever the so-called policy is?

MR. WOODINGTON: Object to the form.

THE WITNESS: To a certain agree, yes.

BY MR. HAMM:

Q. Okay. Are you telling me that -- well, let me asked it another way: Have you created a directive that says we're going to make sure every directive meets the following standards and is there a document that says, all right, here's the directive and here's what we've got to make sure every directive does and I'm going to make sure they meet that. I think I just heard you say, no, Steve, that's just not how we do things; is that a fair characterization?

A. I mean, I've worked in different sectors that it just -- yeah, it just doesn't work that way. There's not a manual for creating policy. You can learn about what components and, you know, what needs to be included in policy, what doesn't need to be included in policy, what might need to be

more of a guideline or a principle. So there's, you know, things that you learn, you know, through your education and experience that help you shape policy.

Q. So to the extent that an individual is not in your position or is indeed not even employed by DDSN, they might not know about the consideration, construction, or adoption of a directive; is that correct?

A. Can you rephrase it?

Q. I'll be happy to.

A. Yeah.

Q. Let's just use me. I don't work for DDSN. I have developed a great interest in your fine organization. I want to say that. And I want to know about directives that are under consideration, how would I learn that?

A. Through the Web site.

Q. All right. Now -- but the Web site as I understand it reflects directives that have been adopted; is that correct?

A. No, it also reflects directives that are undergoing review or new directives.

Q. All right. Now, have you all done a determination that all of the individuals served by DDSN have computers and access to the DDSN Web site?

A. No, I would say not everybody does.

Q. Okay. So to the extent that I don't have a computer, what notices do you send out to potentially affected parties that you are considering a directive that might either change or eliminate some service I'm currently receiving?

MR. WOODINGTON: Object to the form.

THE WITNESS: Directives don't eliminate services, first of all, so I can't answer the question the way it was phrased.

BY MR. HAMM:

Q. All right. Well, let me just phrase it another way.

You just told me that I don't ever need to worry, no directive has ever eliminated a current existing service.

A. Correct.

Q. All right. Has a directive ever changed the standards or eligibility by which a service might be received?

A. The eligibility directive has undergone revision.

Q. Okay.

A. Yes, just like the other directives.

Q. Okay. Let me -- let's go back to what

I was just saying.

A. Okay.

Q. I -- I live in Laurens, I don't have a computer. Someone in my family is the recipient of services from DDSN, I don't know about the Web site. What -- what is the policy that ensures that a directive that might change or alter my son or daughter's eligibility, how do I -- what is the procedure and policy to make sure I know about it?

A. Well, there's all kinds of vehicles that are used. We used advocacy organizations to communicate that to people. We have our service coordination system.

Q. What does that mean?

A. These are people that work directly with our customers and that they are responsible for ensuring that people, you know, are informed about services and how best to meet their needs, options that might be available to them, things of that nature.

Q. Is there a -- how do you know that that's taken place? Is there a directive that says, that someone could report to you, is there a form that I would know, I'm in Laurens, how is it that you know that that communication with an advocacy

organization actually resulted in me knowing about a directive?

A. Oh, I mean, I can't -- I can give you an example. Last night we had a public meeting and at that public meeting there were people who use services. The public meeting was announced through the Web site and we had families and customers attend the public meeting as a result.

Q. All right.

A. And service coordinators were there and actually one of the service coordinators commented on getting her folks on her caseload together to talk about some reductions that were being proposed in one of our home and community-based waivers. And she came and presented their viewpoints for us to hear. So she had shared the information so that they could respond.

Q. You've just told me that there is no directive that says in -- number one, is there a directive that deals with individuals that don't have access to the Internet?

A. No, not to my knowledge.

Q. Okay. Would it surprise you that individuals receiving service from DDSN don't all have access to the Internet?

A. No.

Q. That would not surprise you?

A. No.

Q. All right. But at the moment, there is not a process by which you have a directive, a checklist or even a policy that attempts to ensure that me in Laurens, no access to the Internet, whatever, know about a change? In respective, I think what I've heard you say is, well, no, we try to do our best for an advocacy organization but I think I'm hearing you say, no, we don't have a process to make sure that the example I've been using -- using me as an example in Laurens, that I might not know about it despite your efforts?

A. Right.

Q. Now, when you have a meeting -- let's just talk -- again, I'm intrigued by these directives. You've already told me they can change, yes?

A. Right.

Q. Who decides when a directive can change?

A. Well, there's a directive that describes the process that the directives go through to ensure that they're up to date and current and

reflect the mission and values and principles of DDSN. So through that process they automatically go through a review period and comment period.

Q. Well, again, using the example that I've used in me -- I don't have access to the Web site -- in fact, let me follow up.

You talked about advocacy organizations, help me understand what organizations you might be referring to.

A. South Carolina Autism Society.

Q. Is there a -- excuse me, I interrupted you and I apologize.

A. The South Carolina Association for Retarded Citizens, the South Carolina Brain Injury Association, the South Carolina --

Q. Whoa, whoa, whoa, whoa.

A. Oh.

Q. I have enough trouble reading my writing when I do it slowly.

A. Okay.

Q. Okay. Association for Retarded Parties --

A. Citizens.

Q. -- Citizens.

A. Uh-huh.

Q. Okay. Autism Society. What else?
A. The South Carolina Brain Injury Alliance.
Q. Okay. What else?
A. The South Carolina Spinal Cord Injury Association.
Q. Okay.
A. And there's a Partnership for Disability Organization.
Q. Organizations?
A. Uh-huh.
Q. So --
A. It's a compilation of the ones that I've mentioned above. They get together and work with one another.
Q. What others?
A. Then there's the -- there's consumer support groups.
Q. Is consumer --
A. Customer support groups.
Q. Yeah, but is that sort of informal alliances of parents or whatever, what is that?
A. No, they're -- well, the -- you know, they are self-advocacy groups that are very formal. We have a statewide advocacy group, self-advocacy

group.

Q. Which -- that would be what?

A. They call themselves South Carolina Impact.

Q. Okay. What else?

A. And then each county typically has a self-advocacy group where they get together and talk about issues and problems and concerns and things that they want to see changed about anything -- very simply about what they eat for breakfast to where they want to live.

Q. Right. Who else? I'm just trying to get as complete an understanding when you say you communicate with advocacy organizations. You've been kind enough to share half a dozen at least. Are there others?

A. There's all kinds of committees. There's the Adult Protection Coordinating Council. One way to communicate different activities. There's the Professional Association like the South Carolina Association on Intellectual and Developmental Disabilities, which is a professional organization. There's the Human Service Providers Association.

Q. Is there a directive that identifies

the advocacy organizations that must be notified when either a directive is either under consideration for creation or is under consideration for change?

A. No, but the directives are on the Web site and you can comment on them at any time.

Q. So there's no directive that addresses what organizations must be contacted for purposes of putting them on notice about changed directives?

A. Right.

Q. And, again, you've been kind enough to list to me. Are there others?

A. I'm sure there are.

Q. I'm just --

A. Yeah.

Q. -- I recognize there's a lot. I'm just wanting to make sure that I take the time to give you the opportunity, well, Steve, I just thought of so and so and I want to -- I invite you to --

A. There's at least -- there's at least 40 self-advocacy groups across the state.

Q. All right.

A. There's at least, you know, 20 support groups across the state. There are Internet networks where, you know, information is

disseminated, that kind of thing so, yeah.

Q. All right. What mailings -- does your directive that describes the process to create directives, does it require mailings to anyone?

A. No.

Q. Does it require logging phone contacts to confirm that an organization knows about a directive or potential change in directive?

A. Well, we -- we send all the directives to the providers that we have contracts with via e-mail.

Q. Okay. Is there a directive that requires a provider to share the contents of that communication with individuals or their families receiving services?

A. No.

Q. So there could be a directive that a provider knows about but there's -- that doesn't necessarily mean that someone receiving those services would necessarily know about it?

A. Right.

Q. And there's no policy or directive that addresses that dissemination of information?

A. Right.

Q. So how -- how does -- try to be

respectful -- the Associate State Director of Policy affirm that all of sort of the stakeholders in a particular directive know about it?

A. How do I know that --

Q. How do you confirm -- you have indicated to me --

A. You can't ever confirm that all your stakeholders --

Q. Okay.

A. -- know about -- yeah.

Q. But do you have a process and by which you attempt to confirm in some sort of document or directive that we know the following organizations, individuals and family members who may be affected by a directive know about it?

A. We get -- comment on a regular and routine basis from the Web site when people question a directive or want more information, we do customer surveys about things that are working well in their lives and thing that are -- they want to see changed. We do personal outcome interviews to get a sense of the quality and meaning that's in that person's life. We do organizational reviews of our providers to determine if they're fulfilling the mission. We interview people on site that are

getting services. So it's more of the impact that directives have.

Directives are intended to protect people that use services. They're intended to, you know, strengthen the service delivery system. Not intended to harm people.

Q. I wasn't attempting by my questions to suggest --

A. I didn't say you were.

Q. Okay.

A. I was just adding that as a personal matter.

Q. But I understand you to say, well, Steve, if you came to my office, I would be unable to show you that -- let's just say you and I in random picked up a directive, you would be un- -- you don't have a process, let me be fair. You don't have a process to say, Steve, our policy is and since I'm the -- and I say this respectfully, I'm going to refer to you as a policy guru, and I don't mean that in any way to be derogatory.

A. Sure.

Q. I think that is what you are. It's an important position and I appreciate that it's important. But you'd be unable to say, well, Steve,

if you look at this, I can assure you that and I'd have a list -- I'm not going to be able to look at a list that you would say, don't worry, I can tell you every one of these organizations got it, that's fair, right?

A. No, I can tell you every organization that got it.

Q. Well, tell me how you -- is there a directive that ensures that that happens?

A. I -- you know, I can't go back to saying whether it's in the directive that establishes the directive process but I think that it's included in there.

Q. Okay.

A. And we do have distribution lists so it may be an internal --

Q. Okay.

A. -- operational matter rather than a directive. Directives don't necessarily tell DDSN how to operate. Okay, that would be a whole different matter --

Q. Okay.

A. -- than what the directives' intents are.

Q. You've just made reference to another

entity or concept I don't think I'd heard just yet. It may not be a directive, it may be and I missed what you just said.

A. Well, I'm saying that there are, you know, standard operating procedures. I mean, you know, procedures are aren't always written down about when you do what and how you do it. They might be in your job description but talking about, you know, how things get done is part of being the professional in the job you're in.

So we do have a way to verify who we sent directives that are under proposed revision or just proposed review. We do know who those go to.

Q. Okay. And I'm not arguing with you. I'm trying to understand what is it -- you say that to me. Do you have a directive that requires you to audit that, in fact, directives are being followed?

A. Yeah -- we do have other things that help us understand whether directives are being followed, yes.

Q. All right. One of the things I notice in the Legislative Audit Council report was you all committed to, in fact, enforce a directive that LAC said you weren't enforcing so that caused me to wonder do you have an audit procedure?

A. I'm --
Q. Because in the --
A. I'm unfamiliar with the statement you just made --
Q. And I'm going to point it out.
A. Okay. Well, that would be helpful because if you're basing your question on that --
Q. You're not familiar with that. We'll go to that. We're going to get to that. I'm just -- again, I'm trying to understand there's directives and then there's -- and I don't think I've heard you use a term to describe it but there's directives but there's also other things that apply to make sure things happen. And I think you used a term and maybe I missed it or maybe I misunderstood you.
A. I don't understand --
Q. Okay.
MR. WOODINGTON: Steve, when you get to a breaking moment --
MR. HAMM: Well, why don't we break. I'll be happy to.
MR. WOODINGTON: Fine.
(Off-the-record conference.)

BY MR. HAMM:

Q. Welcome back. I just asked the court reporter to help both of us. I asked her to go back about that phrase that I thought I heard you say. And I think you used the phrase internal operating matter?

A. Uh-huh. Right.

Q. Okay. An internal operating matter is what?

A. How you do your job.

Q. Okay. We'll mark as Hearing Exhibit No. 2 a job position description.

(PLF. EXH. No. 2, A Job Position Description, was marked for identification.)

BY MR. HAMM:

Q. Do you recognize this document, Kathi?

A. Yes.

Q. Describe what I've handed you for the record, Kathi, please.

A. The position description for a program manager III, which I'm in that current state title.

Q. Okay. Now, does this document serve as part of the standards of how you serve as the -- let me back up in my notes here -- Associate State Director of Policy?

A. Yes.

Q. Does this position questionnaire accurately reflect your job responsibilities and obligations as of now?

A. Yes.

Q. It says that you -- can I read this and conclude that Dr. Kathi Lacy has a thorough knowledge of state level policies, procedures, functions and interagency relationships -- I'm reading in Number 2 on the first page.

A. Oh. Excuse me. Yes.

Q. And that you have a thorough knowledge of public sector administration practice procedures and standards?

A. Yes.

Q. And that you have extensive knowledge of disability populations and service delivery systems?

A. Yes.

Q. And that you are a skilled developer of policies and procedures to enhance efficiency and effective of service delivery systems?

A. Yes.

Q. Okay. I want to focus on that for a moment.

A. Okay.

Q. When this refers to policies, skilled developer of policies, I thought the Commission established policies. Is this suggesting that you have taken over some of the policy obligations from the Commission?

MR. WOODINGTON: Object to the form.

THE WITNESS: No.

BY MR. HAMM:

Q. Okay. Well, help me understand what this means.

A. You know, the -- the word program policy is actually used on the next page.

Q. Yeah, and I want to get to that.

A. Well, I'm answering your question, though.

Q. Oh. Okay, fine. Fine.

A. So program policy is different than a Commission policy. And as I illuded to earlier, I believe, the term department directive was there when I got to the office. And with my educational background, I considered those to be more, you know, policy-related kinds of documents. But they certainly reflect what the Commission has and what the state statute has directed us in terms of

service delivery system for people.

Q. Were you involved in the creation of the language describing the position?

A. The -- this 1, 2 and 3?

Q. Yes.

A. 4?

Q. Yes.

A. No.

Q. So who in your position description created the phrase skilled development -- developer of policies?

A. I guess that would be Dr. Butkus.

Q. You have in the course of a response to me a few minutes ago, Kathi, said, well, I think you were suggesting -- well, Steve, you ought to sort of read into skill development of program policies?

MR. WOODINGTON: Object to the form.

THE WITNESS: I was just saying that the detail about what kind of policies is laid out in the actual job duties and it referred to program policies.

BY MR. HAMM:

Q. But I'm -- and again, I'm not trying to be difficult, I'm just looking at a document that describes the position that you currently hold

and -- so you're -- this is not a trick question and I'm not trying to play around with you, so let me just say that.

When it says you're a skilled development of policies, is that -- does that somehow not accurately describe your job position description?

MR. WOODINGTON: Object to the form.

THE WITNESS: This says what knowledge, skills and abilities are needed by an employee upon entering into the job --

BY MR. HAMM:

Q. Right.

A. -- including any special certification.

Q. Right.

A. So I had skills in developing policies because of the graduate work that I performed.

Q. Okay. Okay. And that's fine. All right. Now go -- let's now go to Page No. 2.

I'm looking at job purpose on page No. 2, Kathi. Management oversight of the office of policy. If I were to call over there and try to track you down, if I asked, well, I need to talk to -- I can't think of her name, but the lady who's the head of the office of policy, is that -- is that

how you're known inside the organization as running the office of policy?

A. Yes.

Q. Okay. And then it goes on and, in fact, I think this job purposes, it goes on and basically lists your areas of responsibility that you described to me in response to an earlier question when we were talking about mental retardation, health and spinal, that's -- that's where that -- I guess would be the source document of why you have that area of responsibility because it's listed here, correct?

A. Yes.

Q. Okay. Has the organizational structure of DDSN as it regards -- let's start with just you. Has it been reorganized or have you reorganized when you obtained that position, I think you told me in 2002?

A. Right.

Q. Okay. And I'm noting that this document was created in January of 2003. Does this reflect that the position -- that the position description was altered to reflect changes in that position? Who had your -- well, let's not ask too many questions at once.

A. The position before I took it -- well, it was a newly created position that broke Dr. Brent Coyles who was the Deputy Director of I want to say programs, I could be wrong about what his title was. And he was in charge of both, you know, we called it programs back then and updated it to policies and operations.

Q. So is the office of policy an office that was denominated under that name to reflect the job assignment given to you in 2002 when you received that position?

A. Yes.

Q. Okay. So we wouldn't see a prior position description because -- I think I'm hearing you say you essentially were placed in a new position with job assignments that reflected some reorganization of senior management?

A. Sort of.

Q. Okay.

A. There was one person in a position that had both what we used to call program equated to policy. I don't know what was in his job description. I can't attest to that. But he had these functions and he also had functions related to the operations component of the agency.

Q. Okay.
A. And that position was divided into two positions.
Q. Okay. And is that still the structure that exists at the moment?
A. Yes.
Q. And both -- you fill one of those positions and who fills the other?
A. David Goodell.
Q. Okay. That's a name I recognize.
One of the things I didn't ask you before when we first started but let me go ahead and do it now. You've indicated that you've had some other depositions. I took the time to read your earlier one just to get a flavor of how you came across in writing. What did you do to prepare for this deposition?
A. This one?
Q. This one. Yeah, I'm not -- I'm not getting involved in other cases.
A. Okay.
Q. I'm going to stick with what I --
A. I --
Q. I read it as simply as a matter of trying to educate myself. I am not -- I'm not

involved in that other litigation. Don't fully understand what it is, nor do I need to at the moment.

A. I read the briefs, I don't know what all of them are exactly called.

Q. Okay.

A. But the questions that you proposed and that our attorneys responded to.

Q. Okay. What else?

A. I met with my general counsel Tana or Ken Woodington.

Q. Okay. When did that -- I don't -- I don't want to know what was said.

A. Right.

Q. But when did that happen?

A. It was either last week -- maybe last week.

Q. Okay. And how long did you meet with him?

A. A little over an hour.

Q. Okay.

MR. WOODINGTON: And actually, it's not coaching, it was this Monday, I think.

THE WITNESS: Okay.

MR. WOODINGTON: Time flies when you're

having fun.

MR. HAMM: I understand totally and completely. I get two or three days away from something, I don't know if it was this week or three weeks ago so that's not a problem.

BY MR. HAMM:

Q. So was it as a result of that meeting that you read the briefs or memos that were filed in this matter?

A. Yes.

Q. What else did you do to prepare?

A. I read the state statute related to DDSN.

Q. Okay.

A. And that might be about it.

Q. Okay. And how much time did it take you to accomplish those various tasks?

A. Maybe three hours.

Q. And you were excited by the brilliance and pros of both sides when you read all these documents?

A. Sure.

Q. Good. Well, very good answer. Very good answer.

Did you read the complaint in this

lawsuit?

A. Yes.

Q. Okay. Again, I am not asking you any question about any conversation you've had with your very distinguished counsel. But I do want to know -- you read -- when you read the lawsuit, was that in preparation for this deposition?

A. I believe I read the lawsuit when it first came.

Q. Okay.

A. And then I read it again in preparation for the deposition.

Q. Okay. And you're aware that counsel provided an answer?

A. Yes.

Q. Okay. Were you involved in the creation and approval of the answer?

A. Yes.

Q. Again, without -- without going into any conversation you had with counsel, so you saw the lawsuit when it was filed, apparently you must have had a meeting with counsel?

A. In 2007?

Q. Yes.

A. I believe so.

Q. And I think I just heard you, I'm to understand to say, that you were involved in providing DDSN's response or answer?

MR. WOODINGTON: Object to the form.

THE WITNESS: Correct.

BY MR. HAMM:

Q. So the answers contained in that document reflect that you reviewed and approved all of those?

A. I'm not saying I approved all of them because there are legal terms and things in there that I wouldn't have known how to put together.

Q. Okay. I think you indicated to me you looked at the memorandum and I'm excited that you were excited with the brilliance written on both sides. Kind of you to say that.

You looked at the complaint that was filed and you've just acknowledged that you had some involvement in the creation of the answer to that.

A. Yes.

Q. And I think I also heard you say that you had some involvement in the response to interrogatories in which we asked certain questions and some of which may have been answered, some of which were not?

A. Yes.

Q. Okay. So to the extent that you and I -- we're going to go over some of those in the course of this. Those are questions and responses that you were exposed to and were familiar with prior to our having this opportunity to talk today.

A. Yes.

Q. Let's -- I want to -- I want to make sure that I understand. We're going to mark as Hearing Exhibit No. 3 a document that -- let me hand that to you.

(PLF. EXH. No. 3, DDSN Organizational Chart, was marked for identification.)

BY MR. HAMM:

Q. This is a document that your counsel gave to us as part of the discovery process. Do you recognize this document?

A. Yes.

Q. What is it?

A. It's a DDSN organizational chart.

Q. Right now the State Director is no longer Dr. Butkus and Dr. Andy Laurent is, as I understand it, serving on an interim basis?

A. Yes.

Q. And your position is reflected in the

box immediately below the State Director?

A. Yes.

Q. Okay. When you -- your position of State -- Associate State Director of Policy, does your policy obligations and responsibilities also cover policies and administration shown by Deputy State Director of Administration and there's a series of positions below it, Director of Government and Community Relations, do you have obligation to make sure that whatever they're doing are consistent with policies of the Commission?

MR. WOODINGTON: That got kind of long.

MR. HAMM: Okay.

MR. WOODINGTON: Could you try again.

MR. HAMM: I'd be happy to. I'd be happy to.

BY MR. HAMM:

Q. Kathi, look at Deputy State Director of Administration. Do you see that box?

A. Yes.

Q. And then I'm just picking a box, Director of Government and Community Relations. What is that position? What is that?

A. That's the person that spends time in educating the legislature, follows up on some

constituent issues that they might have, responsible for communicating with the media.

Q. Okay. Now, who holds that position?

A. Lois Park Mole.

Q. That's three words?

A. Yes.

Q. Lois Park Mole, M-O-L-E?

A. Right.

Q. I didn't know if Park Mole was one name or two.

Do you have responsibilities to make sure that the Director of Government and Community Relations is, in fact, correctly sharing the policies and directives of DDSN?

A. No.

Q. So the Director of Government and Community Relations may, in fact, be articulating a position unknown to you since you don't have responsibility for that position?

MR. WOODINGTON: Object to the form.

THE WITNESS: Sure.

BY MR. HAMM:

Q. Now, finance and accounting is -- the Director of Finance and Accounting is I am assuming, and correct me if I'm wrong in this assumption, that

they are making sure that on -- on an internal basis that the funds are being -- are going where they're supposed to be going and you can account for them, yes?

A. I assume so.

Q. Okay. If you don't know, that's fine. I'm not trying to put words in your mouth. I'm just trying to understand just how broad Associate State Director of Policy. And I think I heard you say, well, whether the government community relations person is communicating policy of directives as you understand it, that's not an obligation or responsibility you have in your position?

A. Right.

Q. Now, is the Director of the Legal Services Division the very fine lawyer that's sitting here with us today?

A. Yes.

Q. Okay. And that's the position that was formally held by Jim Hill?

A. Yes.

Q. Okay. All right. So I think I hear you telling me that, well, Steve, if you go over on this organizational chart to Deputy State Director of Administration that is not an area that you have

responsibility for or have to be -- and they're not accountable to you to make sure that they're following whatever your policy or directives are?

A. That's correct.

Q. All right. Let's go on the chart now and go to the right. Associate State Director of Operations, now what is that?

A. The person that's in that job is David Goodell.

Q. Okay.

A. And he has responsibility to make sure that the providers that we contract with understand the policies, directives, service standards and are using them.

Q. So he -- you work with him to ensure that he is implementing the directives and internal operational matters?

A. They're not internal operational matters, they're more in the day-to-day operations of how our providers are operating.

Q. But there are directives that deal with how providers are supposed to do and not do.

A. Yes.

Q. So again, do you have responsibility for ensuring that Mr. Goodell and these district

directors, two of them, are, in fact, implementing and following the directives that you have responsibilities for?

A. To a certain degree. Depends on what directive you're talking about.

Q. Well, I'm trying to understand the scope of your responsibilities. And so far, if I'm hearing you correctly, and correct me if I'm wrong, Steve, look at the chart. Look underneath my box and that's where I'm responsible for these policies and directives. I mean, that, you've already told me, that's correct, yes?

A. Yes.

Q. Okay. I think, and I'm not trying to put words in your mouth, if I went to the left box under Deputy State Director of Administration, that is whether they are or are not complying with whatever the directives of policies, that does not come under your responsibilities, at least that's what I thought I understood you to say?

A. Right. I mean, it --

Q. Okay.

A. -- most of the -- I mean, it's kind of a strange way to form the question because many of the directives don't apply to people that work for

the Deputy State Director of Administration.

Q. All right. And so let me rephrase the question --

A. Okay.

Q. -- so it's not strange.

A. Okay.

Q. To the extent that a directive has an impact on communications and government in community relations, you don't determine, monitor whether or not communications are, in fact, consistent with the directives, that's all I'm trying to get clear on.

A. Yeah, I'm not -- I'm not that person's supervisor.

Q. Okay. So who is responsible for doing that?

A. The person's supervisor.

Q. Okay. And is there -- has the Commission adopted a policy about how these policies and directives must or must not be applied in the organizational chart?

A. That wouldn't be their responsibility, no.

Q. That wouldn't be the Commission's responsibility?

A. Not to my -- I mean, not to the Deputy

State Director of Administration. It would be them communicating to the State Director what they're vision, mission, values, principles and what they direct him to direct us to do.

Q. Well, if the -- if there is a change on funding for services, that would have an impact on a directive, yes?

A. Not to my knowledge.

Q. Okay. So you can have a directive and -- that indicates that something is going to take place and the -- and the funding is changed that impacts the ability to comply with the directive, that's not your responsibility to determine that or follow up on that?

A. You've lost me.

Q. Okay.

A. Try it again.

Q. I'll be happy to.

A. Okay.

Q. Deputy State Director of Administration -- so again, I'm just trying to so you and I are looking at the same document.

Directives, as I understand it, apply to a wide range of operations, provision of services, and so forth at DDSN.

A. The intern -- not about internal operations. They are directed more towards, and if you look at the their applicability, each directive has a different applicability group. One could be toward providers, contract and service providers, regional center, others may --

Q. Okay. Assume for purposes of my question that I am not trying to suggest that every director -- every directive has an impact on administration. I'm just positing the question that to the extent that the government and community relations, which is you've talked about sort of outreach and communications, I think that might have -- communications, I know was a word that you used -- or the financing -- finance and accounting, if they make decisions or changes that impact on a directive that might apply to them, you are not the person to make that determination; is that right?

A. If they make changes that apply to the directive?

Q. A directive says we're going to reim- -- that a provider can only provide X, Y, Z services. Start with there.

A. A directive doesn't do that.

Q. Okay. Describe the directive to me

again.

A. I'll use an example.

Q. Please do.

A. There's a directive on how to report abuse, neglect and exploitation.

Q. Okay.

A. Okay. So that directive probably has, you know, broad applicability. Maybe one of the broadest --

Q. Right.

A. -- of our directives. And so if -- if through one of their job duties the Director of Human Resources is visiting a regional center campus and finds that -- that sees something that they think might fit into abuse, neglect or exploitation, then they would have an obligation to report it. Okay?

My job is to make sure that those directives that do apply to people in the organization, that they understand them.

Q. Okay.

A. Okay.

Q. And I appreciate that answer but it really goes back to the question that I'm asking and let's use human resources since that was the example

that you gave.

How is it since you're the office of policy, how is it that you know and evaluate whether the Director of Human Resources makes decisions consistent with a directive or a policy?

A. Again, there are -- most of the directives that I am the originator of do not apply to the Director of Human Resources.

Q. Well, let me -- let's narrow it. Are there any directives that apply to human resources?

A. They are the originator of many directives.

Q. All right. But you --

A. For example, on prohibition of sexual harassment in the organization.

Q. Okay.

A. Okay. No, and it is not my job to ensure that the Director of Human Resources is following that directive. It's not my job.

Q. Okay. Again, I'm not trying to be argumentative or suggesting that I think you should be, I'm just trying to understand. So whose job is it?

A. The person's supervisor.

Q. But if you're the office of policy, is

there any -- can a directive come into existence without your knowledge?

A. I suppose so.

Q. So you're the Director of the Office of Policy and you told me when we first started this morning, Kathi, that you were responsible for the -- I wrote it down -- you were the responsible for the directives of the department. Am I now understanding that's not entirely accurate?

A. You asked me the question if there could be a directive developed without my knowledge and I answered yes.

Q. Okay. And I'm now asking you does that mean when you said you were responsible for directives of the department that that may not be entirely accurate because I don't -- or are you saying you're responsible for stuff you don't know even about?

MR. WOODINGTON: Object to the form.

THE WITNESS: I'm saying that I have a State Director that has authority over me and control over what I do. And if he or she determined that there is going to be a directive and it falls under the Deputy State Director of Administration, that I may not know about that.

BY MR. HAMM:

Q. So --

A. And that I have somebody else that's managing the directive system for me and that there could possibly be something that gets developed that I do not know about. That's basically it. It would be unusual, it's never happened to me.

Q. But as we sit here, it may have happened and you don't know because there may be a directive you don't know about?

A. No, I do know about all the directives.

Q. Oh, so --

A. You asked me if it was possible and I said yes, it's possible.

Q. And I appreciate that.

A. Okay.

Q. And again, I'm not trying to be argumentative and I'm not trying to put words in your mouth, so. And I appreciate your candor with me and I'm not -- I'm not quarreling with you when I'm asking these questions. I'm trying to make sure I understand so don't -- don't read anything into that I am not -- that I'm quarreling with your answer, I'm not.

A. I'm just responding --

Q. And you are and I thank you for that. I mean, we're doing fine and I appreciate that. I'm not -- I'm not trying to create a dispute here. I'm -- when you hear me ask you a question, I'm just trying to make sure I understand.

A. Sure.

Q. So let me go back to it because I think I've missed something and that's why I'm going back.

You're responsible for the directives of the department.

A. Responsible for the system and the process.

Q. Okay. But -- I'm trying to make sure I understand what that -- what that means. You've been clear to me in terms of here in Exhibit No. 3 that the box of the, I guess, MR, Mental Retardation -- is that mental retardation division and then quality -- that --

A. Yes.

Q. -- that -- you've told me, Steve, I have responsibility for all those directives. To the extent that a directory -- a directive originates somewhere else, on this organizational chart, do I understand that you when the directive is either under consideration or approved you may or

may not be involved in that?

A. No, when it gets -- when it gets originated and sent out for distribution and comment, I am part of that process.

Q. Okay. All right. And now let's go back to something I was asking you. Distribution and comment. I used the example of someone who is not connected to the Internet or whatever and may not for any number of reasons be a member of an organization, there is no directive that addresses how you ensure that everyone may know about either a directive or a change in directive?

A. Right.

Q. Okay. Okay. And very candidly, I have not looked at, you have referenced that there was a directive on directives.

A. Yes.

Q. Okay. When I asked you some questions a little while ago, I thought I heard you to say, well, Steve, we don't -- well, let me ask it: Do you have an audit procedure to know that the directive on directives is, in fact, complied with every time?

A. Yes.

Q. And what document would I look at that

would tell me, well, Steve, here's a document that shows the procedures that we go through to show consistent compliance with directives?

A. That would be from a woman that works for me that is responsible for the day-to-day management of that process.

Q. Okay. So if I were to talk with her or she was sitting where you're sitting right now, she would be able to say, we have a procedure that we can show that we consistently apply to assure compliance with the directive on directives?

A. Yes.

Q. And what is your understanding of what document I would look at? What does it say?

A. Well, I get a report periodically that tells me which directives are do for review.

Q. All right.

A. For example, the current directive on directives says they have to be reviewed at a minimum every three years.

Q. Okay.

A. And so I know which directives are -- that there's a timely response to that.

Q. Okay.

A. And which directives, you know, that

we're shooting the originators more information to make sure that they're getting done timely.

Q. So there is a document that I could look at for every directive that tells me where they are on the review status?

A. Yes.

Q. Because I noticed in the Legislative Audit Council report there was an acknowledgment that that time period had not necessarily been complied with consistently, you recall that finding?

A. Yes. Yes.

Q. So how is it that that happened if you have a procedure designed to make sure that you comply with the directive of directives?

A. Well, the -- the thing that the Audit Council responded upon was that they weren't being reviewed yearly. And so we revamped the process to ensure that there would be a review process.

When I set up the directive for the directives, I was ambitious thinking that those directives could be reviewed on an annual basis.

Q. Right.

A. And it wasn't practical to do so.

Q. So the directive on directives, what, in fact, happened was the yearly review was moved to

once every three years.

A. Yes, that's correct. At a minimum.

Q. I understand that. I understand that. But I'm just going by what I was reading. You've told me about directives on directives and I saw some examples where the Legislative Audit Council concluded that that was not happening.

A. Correct.

Q. Okay. So the move to change it from yearly review to three-year review was -- is that something that was done recently in response to the Legislative Audit Council?

A. It was done -- it was in the works because it wasn't -- we were reviewing directives on an annual basis when there wasn't any futility to doing so anymore. That there -- we were sending stuff out on a regular basis to providers that was causing, you know, more problems than it was helping since there were many directives that didn't need any changes.

Q. Is that a decision that rests with you whether a directive needs changes?

A. No. It depends on who the document manager is for the directive. There all -- all the directives are assigned a document manager who's

responsible for reviewing the directive at a minimum every three years. A lot of the changes to a directive result from a variety of different things.

Q. Can someone receiving services from DDSN rely on a directive?

MR. WOODINGTON: Object to the form.

THE WITNESS: In what way?

BY MR. HAMM:

Q. To the extent that it establishes -- like, we'll go -- we're going to go through the pleadings in a minute. One of the allegations and the complaint was that some directives were changed that altered whether or not an individual could, in fact, continue to receive certain benefits. So I'm trying to understand -- we'll deal with it specifically.

A. Oh, okay.

Q. But I'm trying to understand simply because there's a directive doesn't mean that it might not change, right?

A. Correct.

Q. And going back to our earlier conversation, an individual who's not connected to the Internet, for example, may or may not know either of the existence of a directive or a change

in a directive that may, in fact, have an impact on someone in their household?

A. Right.

Q. One of the things that we asked in the course of our discovery was we asked for the minutes of the Commission where they discussed the promulgation of any regulations for policy. Do you remember that question?

A. Yes.

Q. And what -- do you recall what the answer was?

MR. WOODINGTON: Would you care to refer her to the --

THE WITNESS: Yeah, can I --

MR. HAMM: Yes, I'll be happy to but before we do that I'm just trying to understand what she knows. I'm not --

THE WITNESS: Just ask it again.

MR. HAMM: Yes.

THE WITNESS: I've got distracted here.

BY MR. HAMM:

Q. Okay. We asked for the minutes of where the Commission was advised about regulations to establish policy or anything else -- let me just say it -- and the answer was, well, we couldn't find

any.

A. Uh-huh.

Q. So I'm trying to understand if the Commission has never even under their minutes discussed policies through regulations, I'm trying to understand how it is that you as the head of the office of policy have been guided with regard to the use of regulations when the Commission's minutes don't reflect any discussion on that issue.

MR. WOODINGTON: I object to the form of that --

BY MR. HAMM:

Q. That's fine, you have to answer. Go ahead and answer.

A. Since I've been at DDSN, the practice has been and the interpretation of the state statue has been that the issuance or promulgation of regulations is permissible but not required. And --

Q. There has been a change in the composition of the Commission.

A. Yes.

Q. Remind me how many -- are there seven members of the Commission?

A. Yes.

Q. And am I correct that, what, there's

either been three or four new members?

A. Four.

Q. You already told me you're not responsible for the and perhaps training is not the right word. But you're not responsible for training the Commission as to their responsibilities, that lies, I guess, I think you told me with the Director?

A. Yes.

Q. Okay. Have you had conversations with the Director about the training of the Commission and the issue of using regulations approved by the general assembly to establish policy?

MR. WOODINGTON: Do you mean the current Director or the previous Director?

MR. HAMM: I'm talking about -- well, let's first go with the previous Director.

THE WITNESS: Have I had discussions with the previous Director about training the Commission --

BY MR. HAMM:

Q. Or --

A. -- on the promulgation of regulations?

Q. Right.

A. No.

Q. All right. Have you had that conversation with the -- Dr. Laurent, the new Director?

A. Dr. Laurent did -- we did have a conversation about that.

Q. All right. Tell me about that conversation.

A. I just told him what my understanding was of the state statute.

Q. And that understanding is what?

A. It that the promulgation of regulations is permissible.

Q. Okay. And who decides -- who decides what the policy is with regard to DDSN with regard to how they create policies? Is that you or the Commission?

A. Of how policies are created?

Q. Yes.

A. The only policies that we have are created by the Commission.

Q. Okay. But you told me you don't have a process of having the Commission review and approve directives, right?

A. That's right.

Q. And you've told me that you had not had

conversation with Dr. Butkus with regard to using regulations to establish policy, right?

A. Right, to my knowledge, right, yes.

Q. And you just told me that you had a brief conversation where you shared your view, I guess, your -- did you share your view of what state law was?

A. I read the state law to the Director --

Q. Okay.

A. -- and said that since I've been here, this has been my understanding.

Q. Okay.

A. This is how the department is practiced.

Q. Okay. Let me hand to you -- we'll mark it as Plaintiff's Exhibit No. 4.

(PLF. EXH. No. 4, Defendant's Responses to Plaintiff's First set of Request for Production of Documents, was marked for identification.)

BY MR. HAMM:

Q. For the record, I'll identify it as defendant's responses to plaintiff's first set of request for production of documents. Let me hand that to you, Kathi.

A. Okay.

Q. All right. Let's first -- you hold in your hand Exhibit -- what has been marked as hearing -- Exhibit No. 4, Kathi?

A. Yes.

Q. Okay. And did I correctly refer to it as defendant's responses to plaintiff's first set of request for production of documents?

A. Yes.

Q. Okay. And the total number of pages in that exhibit is seven?

A. Yes.

Q. I'm just trying for the record to make sure you and I are looking at the same thing, Kathi.

Let me -- you had previously when I asked you told me that you had reviewed the responses to our discovery request. Did you review this document?

A. I didn't review -- this is not one that I reviewed yesterday.

Q. Okay.

A. But -- but I do recall having read it.

Q. Okay. So is it your testimony that you were aware of the planned response before it was served on us?

A. Yes.

Q. Okay. Turn to Page 2, if you would, Kathi, and question No. 1. Would you read into the record the question No. 1, please.

A. "The minutes of any meetings of the Commission including but not limited to executive sessions and meetings of any board committees, members, subcommittees, support groups from the period from 1993 through present regarding discussion of the promulgation of regulations of the criteria for the promulgation of regulations or any decision whether or not to promulgate regulations."

Q. Okay. And would you read -- you're welcome to read all of it -- the only thing that I think is relevant but I leave that -- you have a Ph.D -- I think the relevant answer is contained in the subsection C as in cat. Would you read that.

A. "To the best of counsel's knowledge after due investigation, there are no minutes of board committees, members, subcommittees, support groups that relate to the discussion of promulgation of regulations, the criteria for the promulgation of regulations or any decision whether or not to promulgate regulations. If such documents are subsequently located, they will be made available promptly unless privileged in which case the

privileged law will be supplied."

Q. Okay. Now, this document was provided in response dated December the 17th, 2008.

A. 17th, yes.

Q. Okay. Since December the 17th of 2008, do you, as we're sitting here today, are you aware of any discussion regarding the criteria for the promulgation of regulations or any decision whether or not to promulgate regulations?

A. With the Commission?

Q. Yes.

A. No.

Q. This is telling me that since 1993, the minutes of the Commission show that it was not an issue ever put before them to decide one way or the other; is that correct?

A. Yes.

Q. Okay. So help me understand --

MR. WOODINGTON: Could we go off the record for a second?

MR. HAMM: Sure.

(Off-the-record conference.)

BY MR. HAMM:

Q. Hello again.

A. We're on the record.

Q. We're on the record.
A. Okay.
Q. Welcome back.
A. Okay.
Q. Let's go back to this response. You indicated to me that you were exposed to these responses before they were served on the plaintiffs.
A. Yes.
Q. You have hold me that you, depending on your work schedule, regularly attend Commission meetings.
A. In my current job.
Q. In your current job.
A. Right.
Q. And that is since?
A. 2002.
Q. Okay. Prior to that, did you go to --
A. No, not -- not on a regular basis, no.
Q. All right. Well, then let's talk about you got your new job as a matter of policy, yes?
A. Yes.
Q. All right. Now, tell me what you did to prepare and understand that the Commission's policies were prior to the time that you attended Commission meetings.

A. From my previous supervisor Brent Coyle.

Q. Okay. Did you in preparation for and consistent with your job description previously marked as Exhibit No. 2, did you examine DDSN documents including the Commission minutes to make sure you understood what the policies were of the Commission?

A. I did not --

Q. Okay.

A. -- review Commission meeting minutes.

Q. Okay. So when you are the head of the office of policy, you did not examine the Commission minutes prior to -- is it late 2002 or something like that?

A. In June.

Q. I notice that position questionnaire is dated in early of 2003 which I think that's a reflection. You were telling me we're sort of reorganizing and we're getting the paperwork in place to have one position now reflected in two, is that --

A. Yes.

Q. -- fair characterization?

A. Yes, uh-huh.

Q. Okay. Well, then let's go -- when was the first Commission meeting you ever went to?

A. I cannot recall.

Q. When you became the head of the office of policy in 2002, your position questionnaire is that -- is -- I notice that it's -- you signed it in June of 2002.

A. Right.

Q. And it's received in the HR consulting services, which I understand under the terms of that organizational chart that you and I were looking at, that is the office that's under the control of the Deputy State Director of Administration?

A. The -- will you ask that again.

Q. Sure.

A. Okay.

Q. I'm looking on the top -- show me what you saw. I want to make sure you and I are looking at the same thing. Look at the first page, Kathi, of Exhibit No. 2. It shows that it's received in the HR Consulting Services and I'm assuming --

A. Oh, okay.

Q. -- in January of 2003, some seven months after you signed it in June of 2002.

A. Uh-huh.

Q. That date may or may not have a significance and you can help as to whether or not that it does. But did this position questionnaire reflect your duties and obligations at the time you accepted your current position in 2002?

A. Yes.

Q. So the stamping is more the bureaucratic movement of paper within DDSN?

A. I'm not sure --

Q. Okay.

A. -- what the January 2009 -- I don't know if that's Office of Human Resources within the budget and control board or DDSN's. I'm just not sure.

Q. Well, look at -- are you referring to January 23, 2003?

A. Referring to January 29th, 2003.

Q. Okay. And then the December 5th, 2008 it's SCDDSN, so we know it's your organization, policy and operations, is that you?

A. Yes.

Q. Okay.

A. I'm policy. And then operations is David Goodell. We had shared the same administration assistant.

Q. Okay.

A. Yeah.

Q. Okay. So reach back in time with me, Kathi, I'll wave a thing in front of you.

A. Okay.

Q. Go back in time.

A. All right.

Q. Give me your best memory of when you first attended a Commission meeting as the head of the office of policy.

A. Oh, well, it probably would have been the first meeting of the month that I -- so it was probably in July.

Q. Okay.

A. Yeah.

Q. And I'm -- your counsel and I had a conversation off of the record but let me just -- and you heard the exchange that we just had. Do you have any, as the head of office of policy, do you have any awareness of the minutes of any meetings of the Commission dealing with the discussion of the promulgation of regulations, of the criteria for the promulgation of regulations or any decision whether or not to promulgate regulations?

A. No.

Q. Okay. So from mid 2002 -- today is July the 9th -- how did that happen? July the 9th. Wow. You have not been present at any Commission meeting where there's been a discussion of the promulgation of regulations, the criteria for the promulgation of regulations or any decision whether or not to promulgate regulations?

A. Correct.

Q. And you indicated to me that at the time you took the job you did not undertake an examination of the Commission's minutes in order to understand what the Commission's policy was on regulations, promulgation of regulations or whether or not to promulgate regulations.

A. Correct.

Q. Now, you just told me earlier in response to a question that you advise the current interim Director, Dr. Andy Laurent, of your -- I think you used the word understanding, I'm trying to quote you fairly.

A. Yeah, I think that's right.

Q. Understanding of the state statute.

A. Correct.

Q. And tell me again what you told him.

A. That my -- the practice at DDSN since I

had been there had been the understanding that the promulgation of regulations was not something that we did because we used other vehicles to -- to issue directives and hold people accountable to what our expectations were.

Q. All right. And tell me how you arrived at that understanding.

A. From reading the code, the state statute.

Q. Okay. So had you -- I'm not asking what you were told. Have you met with your legal counsel at any time during your service as the office of policy to discuss the issue of promulgation of regulations of policy?

A. Have I met with my legal staff -- repeat it again, I'm sorry.

Q. You met with your legal staff --

A. Uh-huh.

Q. I mean, with regard to the issue of promulgations of regulations, since you've just told me you told Andy Laurent your understanding of the law was that you didn't do it.

A. That we -- that we were not required to promulgate regulations.

Q. All right. And but that's an

understanding you developed by your own reading of the statute?

A. And the practice at DDSN. There are other mechanisms that you can use besides promulgating regulations.

Q. Okay. So -- but the ultimate policymaking body is the Commission?

A. Yes.

Q. And you've indicated to me that since you have been there, you've now been there, what are we now talking about -- seven years?

A. In this job?

Q. In the current position?

A. Yes.

Q. During that entire period, you have no awareness of the Commission ever formally adopting a position pro, con or otherwise with regard to regulation?

A. Correct.

Q. All right. Now, help me -- this is where I'm stumbling. You indicated that you were involved in the creation of the answer to the lawsuit, yes?

A. Which one?

Q. I'm -- the -- we're going to get -- I'm

talking about the lawsuit that was filed in 2007 about the issue of regulations.

A. Right. But there are many responses --

Q. No, I know. I know.

A. Oh, okay.

Q. Right now I'm talking about the answer to the lawsuit, just generically.

A. I don't -- you know what --

Q. Do I need to put that in front of you?

A. Yeah, that would be helpful.

Q. And I will be happy to do that in a moment.

A. Okay.

Q. I'm not trying to confuse you. I'm just trying to understand if you have, as the head of policy, have not discussed this matter or heard a conversation about this matter of the Commission and they're the policymaking body, did the Commission review and approve the answer filed in this lawsuit?

A. I do not know.

Q. Okay. But you reviewed it in your role as the head of policy.

A. I have to see it. I'm not sure.

Q. Okay. We're going to get it out. Just a second.

A. Okay.

Q. But so let's just focus on this for a moment. This answer -- you just told -- you have been kind enough and confirmed to me as of mid 2002 you've never had a conversation with the Commission about either the promulgation or no promulgation and you're not aware of any conversations or discussions by the Commission after December the 17th of 2008, right?

A. Correct.

Q. Okay.

MR. HAMM: Now, do we have a copy of this --

MR. WOODINGTON: We're about to a breaking point unless there --

MR. HAMM: No, no, no, breaking now will be fine.

(Off-the-record conference.)

BY MR. HAMM:

Q. For the record, Jo Anne Wessinger Hill has gone to get the answer, Kathi, so I can put that --

MR. HAMM: Are you bringing the answer?

MS. HILL: Yes.

(PLF. EXH. No. 5, Protection and Advocacy v. DDSN document, was marked for identification.)

MR. HAMM: Let's go back on the record. Ken, you have your answer with you?

MR. WOODINGTON: I do have a copy.

MR. HAMM: Okay. And I have a copy I'm going to give to Kathi.

BY MR. HAMM:

Q. Kathi, let me hand to you what as been marked as Hearing Exhibit No. 5, which if you'll look at the first page is styled as the Protection and Advocacy v. DDSN and it's the answer of all defendants. Are you and I looking at the same document?

A. Yes.

Q. All right. And does the document that you have in front of you is it comprised of 13 pages plus a certificate of service that is a two-page part of it?

A. Yes.

Q. Okay. Okay. What do you understand this document to be, Kathi?

A. Answers of the defendants --

Q. All right.

A. -- questions by the plaintiff.

Q. Okay. In terms -- you recognize the document now?

(Off-the-record conference.)

BY MR. HAMM:

Q. I have handed you what has been marked as Exhibit 5 and you've confirmed it's the answer of DDSN. And you had indicated to me earlier that you had been consulted and were aware of the positions that were being taken in this lawsuit when the DDSN answered, do you recall that answer?

A. I -- I'm not sure I recall specifically answering that I was involved in the answers of all defendants.

Q. Okay. Okay. Well --

A. But I was aware of DDSN's position.

Q. Okay. And you understand DDSN's position to be what?

A. That the statute is permissive in terms of whether or not regulations need to promulgated.

Q. Do you know whether or not the Commission was briefed on that answer prior to the time the answer was filed in this case?

A. I just don't recall.

Q. Okay. Do you view this lawsuit as addressing issues of policy?

A. Not really.

Q. Well, what do you view this lawsuit's addressing?

A. As to whether or not there's a -- going through regulatory process promotes a better product than the way we currently do it.

Q. That's not policy?

A. Maybe in the broad sense.

Q. Okay.

A. You know, it might fit.

Q. Okay. So it may address policy?

A. Sure, yeah.

Q. You may have indicated to me in the break that you may not necessarily recognize this document, is that --

A. I do not recognize it.

Q. Okay. Well, when did you first become aware of this lawsuit?

A. When we got the lawsuit.

Q. Okay. So shortly after it was served you knew about it?

A. Yes.

Q. Okay. Did you get a copy of the lawsuit?

A. You know, I know I read it.

Q. Okay.
A. So I must have had a copy of it.
Q. Do you have an idea who gave it to you?
A. Probably whoever was the general counsel at the time.
Q. Okay. So it may have been Mr. Hill?
A. It might have been, yes.
Q. I don't -- I don't know what the time frame of counsel, that's fine.
A. I think it was Jim Hill.
Q. Okay. And you don't know, as the head of the office of policy, whether or not the commission signed off on the answer?
MR. WOODINGTON: Object to the form.
THE WITNESS: I -- I do not know.
BY MR. HAMM:
Q. All right. Without discussing any specifics, were you ever present at a Commission meeting where the lawsuit was discussed?
A. Yes.
Q. All right. And without telling me whoever was talking to you, was the Commission asked to take any votes on responses to a lawsuit?
A. Not to my knowledge.
Q. Okay. So let's go back to -- you've

indicated that you had an awareness of what we've marked as Exhibit No. 4. And I want to go back to that right now if we can. And keep that complaint with you because we're going to kind of jump back and forth a little bit.

A. Okay.

Q. In terms of response No. 1 and this is -- I think you testified you were aware of this document.

A. The defendant's responses to plaintiff's first set?

Q. Yes. Yes, ma'am.

A. Yes.

Q. Okay. And you either signed off on them or expressed no objection to the responses contained therein?

A. Right, I've reviewed it.

Q. Okay. And you have confirmed that since mid 2002 until today, a span of some seven years, you have not been present when the Commission was discussing, considering the pros and cons of a regulation.

A. Correct.

Q. Take me to Page 3, Exhibit 4, Question 6.

A. Okay.

Q. Read the question, please.

A. "Copies of any and all memorandum, bulletins, reports, e-mails, letters or other documents discussing whether any policies, directives and standards of you and/or SCDDSN should be or should not be issued and promulgated as regulations."

Q. Okay. And then you've indicated that the response that is given here is something that you have signed off on? There are no word documents responsive to the request?

MR. WOODINGTON: Well --

THE WITNESS: To the extent the documents, whatever 7400A- -- yeah.

BY MR. HAMM:

Q. Right. And we're going to get to those. We're going to get to those.

I'm still -- Kathi, what I'm struggle is, how it is you as the head of policy know what the Commission's policy is when you have not been involved in any memorandum, bulletin, reports, e-mails or other documents discussing whether any policies, directives or standards should or should not be promulgated as regulations.

But you told me the Commission established policy and I understand this answer to say and your earlier responses to say, well, Steve, Kathi Lacy, as the head of office of policy, I sure didn't raise that policy question with the Commission, you've told me that.

I'm sort of struck by the phrase well, that's the way we've always done it. Is that where this policy is coming from? Since the Commission, at least in your seven years, based on your best knowledge of what you know, and that's all we can talk about is what you know, they haven't addressed it. So help me understand how you're so firm in your position that that's the Commission's policy?

MR. WOODINGTON: Object to the form.

THE WITNESS: That's something that I learned from working for, you know, my boss.

BY MR. HAMM:

Q. Okay.

A. Is that this is the way that things had -- you know, had been determined that these were -- there were better ways and I agreed with those --

Q. Okay.

A. -- to hold providers accountable. I

mean, I've experienced times where we've tried to use the regulatory process to no avail. In fact, Ms. Gloria Prevost in this room has been part of a subcommittee where we were trying to get DHEC law changed and we got nowhere through the legislative process by promulgating regulations. And I explained to that subcommittee that DDSN could have handled that request instantly by changing a contract or a directive.

So I've been involved in times where the regulatory process is ineffective, it's not time sensitive and it's -- you know, our process that we have in place gives the entire public, the nation really, an opportunity to comment at any time on any of our directives.

Q. But we've already -- we've already established that you don't have a procedure or a directive to deal with folks that may not have access to the Internet, correct?

A. That is correct.

Q. Okay. And you've already told me that you don't publish notices of potential changes in directives and anything in newspapers, you don't do it in the documents. What's the state -- and you don't do it in the State Register, correct?

A. No. Correct.

Q. Okay. So and --

A. Not everybody reads newspapers or the State Registry either so, you know, it's -- there's --

Q. But at least the General Assembly has determined that promulgation and notices in the State Register is -- meets constitutional requirements of notice, yes?

A. I don't know that, no.

Q. Do you know if the South Carolina Supreme Court has issued any rulings that notice on a Web site meets constitutional requirements of notice? Okay.

MR. WOODINGTON: Was that a no?

THE WITNESS: No.

MR. WOODINGTON: I didn't get the answer that it was a no.

MR. HAMM: I heard it.

MR. WOODINGTON: I didn't hear it.

MR. HAMM: We are now at break time.

(A luncheon recess transpired.)

BY MR. HAMM:

Q. Kathi, during the lunch break you did not have any conversation about this deposition with

anyone, did you?

A. No.

Q. I assume that, I just ask.

Let's go back to what has been marked as Plaintiff's Exhibit No. 4. I just want to make sure you and I are looking at the same document. Off the top of your head -- we went to go look for the directive on directives and for whatever reason we were not having a great deal of success. What guidance can you give me?

A. It's one of the low numbers, 101-01 or 102-02.

Q. We will try again.

A. Something like that.

Q. I didn't want to be asking you about something without you and I both having a copy of it. We just weren't able to locate it.

Let me kind of reset the stage in terms of where I thought we left and then we can go from there. I think one of the last things we were talking about, I asked you about your personal knowledge of any minutes or relating to the discussion or promulgations of regulations and since this response was provided in December 17th, 2008, you weren't aware of any in the subsequent time.

And I think you indicated to me that you thought you had probably attended most of the Commission meetings in that interim time, but may have been gone for one or two because of your own schedule, right?

A. Right.

Q. I'm just looking at the questions. As the head of the office of policy, is there any other vehicle other than minutes in which the Commission would articulate some policy or position on a matter that you're aware of?

A. Not that I'm aware of.

Q. One of the things that we were talking about in terms of you were kind enough to talk to me about getting out information, looking back at my notes, of various organizations as a way of trying to communicate with advocacy organizations. Do you have a policy of posting proposed changes or creation of directives in facilities operated directly by DDSN or by service providers?

A. If I'm understanding the question, the directive that y'all are trying to locate might have some procedures in there for -- yeah, directives that affect the operations of facilities.

Q. Again, in fairness, you don't have it

in front, and I'm not asking you to remember verbatim, but of your own knowledge, as we sit here -- again, respectively, the policy guru, do you have a memory or an expectation that you have to physically post proposed policies or changes -- proposed directives or changes of directives in facilities?

A. Our practice is that we do on the Web site post all directives and all proposed directives.

Q. And respectively to you, can I reasonably conclude that what you just said is that you don't physically post directives or proposals in changed directives on the wall in a facility?

A. Correct.

Q. You don't?

A. Correct.

Q. Let me look one more time at this and then I want to go to -- now, my understanding is prior to the filing of the lawsuit you were not posting directives on your Web site?

A. I --

Q. Let me establish the basis for that. We got a letter back --

MR. HAMM: Do we have that?

MS. HILL: Yeah.

BY MR. HAMM:

Q. Let's do that right now. We're going to mark this as Hearing Exhibit No. 6.

(PLF. EXH. 6, A Letter dated November the 22nd, 2005 to Steven W. Hamm, was marked for identification.)

BY MR. HAMM:

Q. Let me let you look at that, Kathi, before I --

I have handed to you what has now been marked as Exhibit No. 6, which is a letter dated November the 22nd, 2005, addressed to me, Steven W. Hamm, and signed by Mr. Hill. Have you seen this letter prior to the time you and I are meeting today?

A. No.

Q. Okay. If you would, go to Page 2 of that letter, second paragraph.

A. Uh-huh.

Q. Would you read -- for the record, would you read that paragraph, please.

A. "The point you made concerning having the policies available to the public is a reasonable suggestion. Availability of these policies has

never been a problem. All request for copies of policies are fulfilled but this can be one more way to provide this information. DDSN will add its directives to the Web site by the spring of next year."

Q. All right. Since we're now talking about policies, we're now talking about an area of which you are responsible at DDSN. Were you involved in the creation of the response -- I recognize you said you hadn't seen the letter.

A. Uh-huh.

Q. But were you involved in the creation of the response to this letter?

A. No.

Q. So you weren't asked to express a position one way or the other on a policy in a letter that was sent to me?

MR. WOODINGTON: Object to the form.

THE WITNESS: Not -- not to my knowledge.

BY MR. HAMM:

Q. Okay. So people other than yourself can state what a policy is -- on staff, I'm talking about. What a policy is without going through you?

MR. WOODINGTON: Object to the form.

THE WITNESS: What a policy is?

BY MR. HAMM:

Q. Yes, ma'am.

A. Yes.

Q. Okay. So when -- when I received this letter stating that the policy was going to be changed, you just told me that it was not -- this is not something you were consulted with prior to its happening?

A. I assume that the way that it was handled was that my boss, Dr. Butkus, asked me to move forward in putting -- I don't know at the time because this -- this doesn't say that -- none of these directives were on the Web site. I honestly do not recall. We had an Extranet and we had an Internet. And I don't know if some of them were on the Internet at that time on the Web site or not.

Q. Okay. But you won't be surprised if I represent to you that prior to this letter they were not on the Web site.

A. No.

Q. Okay. When you talk about the Extranet --

A. Right.

Q. -- is that internal communication

system for DDSN employees?

A. Or our provider network.

Q. Right. Okay.

A. But it doesn't exist anymore.

Q. Okay.

A. Yeah.

Q. So why -- why did it take until November of 2006 to place the directives on the Web site?

A. I don't know.

Q. Okay.

MR. WOODINGTON: I want to object to the form of that last question. Let's go off the record for a second.

(Off-the-record conference.)

BY MR. HAMM:

Q. In your role, do you recognize -- in fact, you made reference to Gloria --

A. Uh-huh.

Q. -- in the room.

A. Yes.

Q. That you -- when did you first come in contact with her?

A. Probably when I served on an advisory counsel with Protection Advocacy.

Q. Okay. Would that have been your -- is that after you became the head of the Office of Policy?

A. No.

Q. So you had had contact with her before?

A. Yes.

Q. So to the extent that Mr. Hill is making reference to -- I'm looking at the paragraph following that he was not aware of any concerns about promulgation of regulations, that is also a response that was not originated by some position you expressed to Mr. Hill?

A. No.

Q. What do you understand P and A is?

A. An organization that's set up by the federal government to ensure that the rights of people's disabilities are taking place.

Q. All right. Do you -- what kind of relationship do you have as the Office of Policy with P and A, just as a general organization?

A. Not -- not very much.

Q. Okay. Is that -- it's just -- there was no need to or...

A. Well, the -- there was somebody else set up to be the liaison with Protection Advocacy at

DDSN.

Q. Okay.

A. And then there's somebody else responsible for kind of the dissemination of policies and such to stakeholders and things like that. My job is to ensure that the process is in place and that things are up to date and reflective of what the Commission, you know, has directed us to do and things like that.

Q. Do you view your job responsibilities of having personal relationships with leaders and various stakeholder organizations?

A. Do I have good relationships with leaders and organizations?

Q. Well, do you view that as part of your job responsibilities?

A. Yeah, I do.

Q. Okay. And you may have just answered it, then, do you feel like you have gone out and developed and maintained those relationships?

A. When it's -- when it's called for. I mean, there's -- it depends on who in the agency that responsibility falls under, yeah.

Q. Okay. I want to talk -- and I now want to go to -- we're still talking about here in

Exhibit No. 4. I want to go to this question of eligibility.

A. Okay.

Q. An eligibility for -- to determine whether or not someone, in fact, is going to receive the benefit of any services that DDSN might provide.

A. Okay.

Q. Now, one of the allegations in the lawsuit, which I'm going to get to in just -- that's where I want to go next, the lawsuit. Goes to the question about the standards of determining eligibility, who decides, and what formal process exist to advise a party that, well, we've decided you're not eligible, that's a broad overview question.

And in the interrogatory responses, your name -- you're the master of a lot of things based on the interrogatory responses. Your name shows up more than anybody's, so it's based on that interrogatory response that I'm wanting to talk about this a little bit.

Number one, has DDSN formally enacted any regulation addressing the issue of eligibility standards, processed to determine eligibility and appeal from a denial of eligibility?

A. In promulgating regulations, no.

Q. Okay.

A. I don't think that it's required that we do.

Q. I understand.

A. Okay.

Q. I understand. And because it's not required is -- is it your position that the DDSN should not?

A. Promulgate regulations?

Q. Yes, ma'am.

A. Any regulation? I -- I gave some examples of where it has acted to the detriment of the health, safety and welfare of people with disabilities. And I have seen that firsthand and I --

Q. Okay. So it would be detrimental for the health, safety and welfare for the Commission to promulgate regulations on the issue of eligibility -- let's just focus on eligibility for a moment.

A. Depends -- you know -- you know, you're asking a hypothetical question. If you promulgated regulations, and it could take years and years and years. So it could be detrimental to people if --

if, for example, new criteria came out about the definition of mental retardation, so yes, it could.

Q. Well, are you familiar with the ability of regulations to account for those kinds of changes?

A. I'm not sure I understand those, no.

Q. Okay. All right. Let me ask it another way. Are you aware if the General Assembly has, in fact, enacted and approved regulations that contemplated changing standards and gave the regulatory agency the authority to deal with changing standards?

A. No.

Q. Okay.

A. I'm not. And if there were an issue with the examples I provided, it would have been good to know in that subcommittee because lives were being threatened of vulnerable adults --

Q. So --

A. -- in community residential care facilities.

Q. Okay. So when you appear before the subcommittee, you were not aware of regulations that, in fact, give some flexibility to an agency subject to a regulation?

A. No, sir.

Q. Okay. Who was with you in that presentation to the subcommittee?

A. Ms. Prevost was there, she was a member of the subcommittee.

Q. Okay.

A. There was an attorney from Mental Health there.

Q. Okay.

A. There was the -- somebody from the Medicaid Agency.

Q. Okay.

A. Somebody representing -- I can't remember everybody.

Q. Okay.

A. We can get that.

Q. And that's fine.

A. Okay.

Q. That's fine. What time period are we talking about in this response?

A. It was after this lawsuit.

Q. And the committee that you're appearing before -- help me clear -- clarify?

A. The subcommittee is a subcommittee of the Adult Protection Coordinating Council.

Q. Okay.

A. And we were formed a subcommittee to address the health and safety of people living in community residential care facilities to hold those facilities more accountable to protecting those people.

Q. Okay.

A. Because there were numerous instances where they were not protected.

Q. Okay.

A. And we went about trying to give DHEC more enforcement and we never got that through.

Q. Now, do you have, since you're the head of the Office of Policy, have you developed relationships with members of the General Assembly to be able to express those concerns?

A. There are other people in the agency that handle that responsibility including the State Director.

Q. Okay. Are telling me so you as the head of the Policy Office for DDSN have not developed relationships with the General Assembly?

A. That's correct.

Q. In the organizational chart that you and I looked at, Kathi, and I'm trying to -- I

think -- if memory serves me correctly, it was the -- it's Exhibit -- I want to just make sure you and I are looking at the same document.

A. Yeah.

Q. Plaintiff's Exhibit No. 3, which is the Department of Disability and Special Needs Agency organizational chart.

A. Right.

Q. It is the Director of Government and Community Relations that has those relationships with the General Assembly or is it someone -- it may be somebody else, I don't know?

A. It's the State Director, the Deputy State Director of Administration and the Director of Government of Community Relations.

Q. Right. Have you ever been -- have you ever requested an opportunity to develop relationships with members of the General Assembly on a policy or other questions for DDSN as the head of the Policy Office?

A. No, that was Dr. Butkus's decision.

Q. And he's never asked -- and he never asked you to do that?

A. No.

Q. So he didn't ask you to do it and you

didn't ask him for that authority.

A. Right.

MR. HAMM: Have we found the directive on directives?

MS. HILL: Do you want to take a quick break?

MR. HAMM: Yeah.

(Off-the-record conference.)

(PLF. EXH. No. 7, Reference Number 100-01-DD, Department Directive, was marked for identification.)

(PLF. EXH. No. 8, Reference Number 100-02-DD, Department Directive, was marked for identification.)

BY MR. HAMM:

Q. Let us look at Reference No. 100-01-DD, and we'll mark that as Exhibit No. 7. Kathi, do you have that in front of you?

A. Yes.

Q. And I notice that it was originally issued in 1987 and it was reviewed apparently and revised on April the 1st of 2009, am I reading that correctly?

A. There certainly could have been lots of other last review dates. This document doesn't show

that.

Q. Okay. It will just show the most recent --

A. Correct.

Q. -- revision?

A. Yes.

Q. Now, what -- looking at this, can you tell me what was revised?

A. Not from looking at this, no.

Q. Okay. What do you know about the minutes or bylaws that the Commission itself may apply -- that may apply to themselves about how they alter positions or authorize a member of the Commission to take action binding on the Commission? Do you know anything about that?

A. That would be binding on the Commission?

Q. Right.

A. I -- I don't know.

Q. Well, I'm looking at this Exhibit No. 7, in the purpose it says: The Commission Chairman, the State Director and the Deputy Director, the Associate State Directors or Director of Internal Audit may originate or declare obsolete these official documents.

A. Uh-huh.

Q. And then they must be approved by the Chairman. And I just -- that's why I was wondering is that the result of a policy adopted by the Commission? Help me understand how all those pieces fit together.

A. It says the documents are approved by -- it depends on what kind of policy it is. So the Commission Chair would sign off on one that was one of the Commission Policies noted below and the types of documents. And then the State Director typically signs off on all of the directives. He has not -- to my knowledge, either Dr. Butkus or Dr. Laurent has designated anybody to sign on their behalf.

Q. That they have not?

A. Correct.

Q. One of the things that caught my attention when I saw this is the documents must be approved by the Commission Chairman. And I'm trying to understand the precedent of this. Is this -- I thought I understood you to tell me that the Commission does not approve directives.

A. They approve policies.

Q. Right.

A. Right. And in the Electronic Communication System there are I believe six Commission policies.

Q. Okay.

A. Of which the Chairman must sign.

Q. Okay. So --

A. So that latter sentence is just depending on what kind of directive it is who's final signature approval needs to be on those documents.

Q. Based on your position as the head of the Office of Policy who was most likely to be the one to approve the documents: The Commission Chairman, the State Director and/or his slash her designee?

A. The State Director.

Q. Okay. So you --

A. On directives.

Q. On directives.

A. Uh-huh.

Q. And am I correct, this is a directive, is it not?

A. Uh-huh. Yes, sir.

Q. Okay. So this directive includes the Commission Chairman but as a practical matter --

A. No -- I see what you're asking.

Q. I'm just trying to sort in mind some things that you've said to me and I'm trying to make them fit together.

A. Okay.

Q. This directive includes a requirement that it must be approved by the Commission Chairman, the State Director or her designee. You had earlier told me that the Commission did not approve directives.

A. Correct.

Q. So -- and is that the result of a policy adopted by the Commission?

A. I do not know.

Q. Okay. But in terms of the way I am reading this document for the first time, it certainly suggest that, in fact, the Commission Chairman may approve directives. But you have told me that is not the normal course of action.

A. I'm interpreting it differently, obviously, so --

Q. Okay. Well, help me -- I'm not trying to put words in your mouth. Help me understand. Have a misstated what it reads?

A. What it's trying to say is that there

are people that can originate or declare obsolete these documents. And that it's setting up a system for how these documents are labeled and what kind of process they go through for review. That's all it's doing.

So it's saying to the public, and in my words, that depending on what kind it is, that one of these two people, unless the Director designates someone, are going to sign off on every directive.

Q. A directive reflects or is consistent with Commission policy. I think that's what you told me earlier today.

A. Yes, yes.

Q. Okay. So -- and again, I'm not trying to put words in your mouth. But I think you've just told me, well, Steve, as a practical matter, the Director -- I'm creating a word I don't think you used, but sort of routinely is the one that does that not the Chairman of the Commission, is that a -- am I --

A. Directives. I mean, the purpose is -- of this directive is to identify the requirement for a communication system to support management, filing and classification of the directives. And directives are typically, if you get to the second

one that talks about their purpose --

Q. And we'll get to that in a minute.

A. -- is not to communicate -- for the Commission to communicate to us, it is for us to communicate what the Commission desires for us to carry out.

Q. I understand that.

A. Okay.

Q. And I understand that. But I'm trying to understand to the extent that a directive is intended to be consistent with Commission policy but the Commission itself is not, according to directives, the parties that reviews them to determine whether they're consistent with their policy, right?

A. Right, that's a staff job.

Q. Okay.

A. A professional judgment, expertise.

Q. So -- okay.

MR. WOODINGTON: Not to put words in her mouth but she's already said the Commission Chairman, I think, signs the CPs and the Director signs the DDs. She said that. You may have not picked that up when she said that the first time.

MR. HAMM: I may not have.

MR. WOODINGTON: At least I think that's what you said.

THE WITNESS: That is what I said, yes.

BY MR. HAMM:

Q. All right. Since I missed something.

A. Okay.

Q. A CP is a Commission policy.

A. Right.

Q. Right. And a DD is a department directive.

A. Yes.

Q. But, again, I'm not -- I'm not attempting to argue. I'm just reading where it says this directive has either got to be approved by the Chairman or -- so, what you're saying --

A. Not this directive. The documents that are in the Electronic Communication System. The documents. And the documents are listed below. It says type of documents in the second paragraph.

Q. All right. Now, help me understand, where will I go to see the policy or philosophical statements issued by the Commission?

A. The same location that y'all found this directive in.

Q. Okay. And there is -- and there is a

specific group of policies and philosophical statements that I'm going to find?

A. You'll find that on the home page one of the -- probably the first thing you showed me --

Q. Right.

A. -- on the home page is a -- talks about our mission and values.

Q. Okay.

A. Vision and principles, strategic plans, strategic goals, things like that.

Q. Is there any documents that would bear a designation of either CP and DD?

A. Yes.

Q. Okay. Give me an example of that.

A. A designation?

Q. Yes.

A. They're listed right there under type of documents.

Q. No. No, I'm talking about would there be a single document that could be both a directive and a -- a DD and a CP as well?

A. No.

Q. No. Okay.

Now, to your knowledge, when was the most recent policy or philosophical statement issued

by the Commission?

A. Well, that's part of our mission. We went through that, gosh, I am trying to think, many, many years ago.

Q. Okay.

A. And so that was our mission and values probably haven't -- gosh, 1997.

Q. Okay.

A. We did it again in 2000, I believe.

Q. Okay. And to your knowledge, as we sit here today on July the 9th, it hasn't -- that hasn't -- changes haven't taken place perhaps since 2000?

A. I believe so.

Q. Okay. Now, remind me, we both in our earlier conversations recognize that the composition of the Commission has changed fairly substantially for this calendar year.

A. Right. In fact, last month.

Q. Okay. And I don't know, what is the term of a member of the Commission, do you know?

A. I think it depends.

Q. Okay. Is there a limit on how long someone can serve as a member of the Commission?

A. I believe so.

Q. Okay. And do you know offhand? It won't hurt my feelings if you don't know. If you do know, share it with me.

A. I don't.

Q. Okay. So I had previously asked you earlier this morning about the process of changing or training or advising members of the Commission and, again, in your role as the head of the Policy or Office of Policy, you told me you did not get involved in the training of Commissioners, am I remembering correctly?

A. In their role as a governing body.

Q. Right.

A. I said that, yes.

Q. Yes. Okay.

A. But, certainly, I provide educational materials and information to them --

Q. Okay.

A. -- that hopefully helps them in their role as a governing body.

Q. Okay. Again, trying to sort of stay in a time frame that was within reasonable memory, the most recent document that you would have given them on a policy-related question would have been what?

A. Gosh, that I would have given them?

Q. Yes, ma'am.

A. Oh, I have -- all my work recently has gone through the new Director.

Q. Okay.

A. So they -- the Commission is to be requesting information that way.

Q. Okay. Have you made a recommendation to the -- is the right thing to call Andy the Interim Director or, I mean, what's the respectful --

A. Yeah, that's fine.

Q. -- thing to do with him or just --

A. Yeah, I call him State Director.

Q. Well, I guess, he is --

A. Yeah, and he's just doing it for an interim basis, yeah.

Q. Yeah, that's fair. So have you made a recommendation to Dr. Laurent regarding the need for training of or updates or overviews of Commission policies?

A. The Commission members are provided -- I guess the answer would be no. The Commission policies are given to every Commission member as a part of their orientation.

Q. Okay.

A. And Dr. Laurent handled that orientation and continues to handle that.

Q. So is it your position that the current Commission cannot change current policy?

A. No.

Q. So have the -- have you given any materials to the current -- currently composed Commission, say, regarding this lawsuit?

A. Oh, there hasn't been time to do anything but respond to --

Q. Okay.

A. -- budget cuts at this point in time.

Q. Okay. And that's fair. So given that, the answer is --

A. No.

Q. No. Okay. So of your own knowledge, do the -- does the currently -- do the newest members of the Commission even know about this lawsuit or do you know?

A. I know it's on the agenda for the work session this month.

Q. Okay. And talk to me about -- what is a work session?

A. Well, we typically have held two a year where we provide more in-depth information instead

of, you know, in a two-hour meeting just trying to equip them with --

Q. Right.

A. -- trends and things that have occurred to give them kind of a broader prospective of how things have been going, where the money has been spent.

Q. Right.

A. Things like that.

Q. And a work session is conducted in conjunction with a board meeting -- I mean, a Commission meeting or it's another --

A. Typically.

Q. Okay. And is that a open forum session?

A. Yes.

Q. Okay. Remind me, do y'all comply with the Administrative Procedure Act in terms of the requirements of notice of Commission meetings, agenda items and those matters?

A. Yes.

Q. Okay. And you -- I'm not questioning you, you say yes because -- how is it that you know that?

A. Well, I see them posted in our

building.

Q. Okay.

A. And I'm around when there's chatter about things going out and things of that nature and I know who's responsible for it.

Q. Okay.

MR. WOODINGTON: And I assume you meant FOIA, Freedom of Information Act?

MR. HAMM: Yes.

MR. WOODINGTON: Not APA.

MR. HAMM: Well, yeah, excuse me, I did. Thank you.

BY MR. HAMM:

Q. FOIA, Freedom of Information Act. APA, which is, of course, the Administrative Procedure Act, but that's --

A. I knew what you meant.

MR. HAMM: Thank you, Counsel.

BY MR. HAMM:

Q. And in that -- will you have any role in advising the newest members of the Commission about this lawsuit?

A. No.

Q. Who will?

A. I think that is our legal counsel,

Mr. Davidson or Mr. Woodington. I'm not exactly sure who Dr. Laurent is having come but I believe it's Will Davidson.

Q. And again, do you know whether that is in open session?

A. I do not know.

Q. Okay. All right. Now, let's go to Plaintiff Exhibit No. 8. A Reference Number 100-02-DD, which is a department directive. And as I looked at this, I think this is the directive on directives?

A. I think so.

Q. Okay. Well --

A. Is how you're labeling it, yes.

Q. Well, and I am.

A. Yes.

Q. And if there's a better way to --

A. No, I think that's okay.

Q. If you have a --

A. That's right.

Q. If you think of it as a different name, I'd be happy to use that.

A. Okay.

Q. Again, I'm not trying to put words in your mouth, I'm just trying to understand.

A. Sure.

Q. Okay. So for short -- shorthand, this is the directive on directives?

A. Yes.

Q. Okay. All right. And it's been revised on December the 1st. I noticed in here that it contained the three-year time period for purposes of reviewing them. Didn't it used to say a year?

A. Yes.

Q. Okay. So that would be one of the changes to it?

A. Yes.

Q. Okay. And is it fair to characterize that change as an effort to be responsive to the Legislative Audit Council report?

A. No.

Q. Okay.

A. It was -- and I think I mentioned earlier that it was in response to -- I had put the one-year time frame in the original document.

Q. Right.

A. And it was an overzealous goal. I had realized when I was taking over this responsibility that there were directives that were very old and I was trying to get them updated as quickly as

possible and I bogged down the system.

Q. Okay.

A. Yeah.

Q. And so that -- the one year to three year is in here. Can you help me with any other revisions that -- because what I have I don't know what was revised and I'm just looking to you to maybe guide me on what was revised.

A. All right. You know there's a memo that gets sent out with these when there is a revision and those aren't attached. But that would be available if you were interested in all the changes ensuring that I covered everything.

Q. Kathi, when you -- go ahead.

A. Excuse me.

Q. I didn't mean to interrupt.

A. I'm really -- I think what we revised in here was to state our intent that -- that we want to ensure that people have an opportunity to comment and to have input into the creating or revision to directives.

Q. Okay. Kathi, turn to Page 7 of 11, steps for having a new document approved.

A. Okay.

Q. Tell me when -- why don't you take a

look at -- I'm going to want to talk about Paragraph A as in apples. Why don't you look at that.

A. Yes.

Q. Okay. Let's go back to a question that I was asking you earlier. Number one, this Paragraph A indicates that the distribution method to the public is via the Web site, correct?

A. Yes.

Q. And I had asked you whether there was any requirement in a directive that also required physically posting like you just referenced the Commission agenda is posted around, and I didn't see that in here. Am I missing that?

A. No.

Q. Or it's just not in there?

A. Not in there.

Q. Okay. Now, go to Paragraph D as in dog, please. It says: The originator or document manager will deliver the signed originals to the ECS coordinator. Remind me what ECS is.

A. Electronic Communication System.

Q. Okay. With a listing of parties. And then if there are entities designated who do not have access to the Internet or e-mail, the originator will arrange to have a hard copy mailed

to those entities upon written request.

A. Right.

Q. Now, how -- if someone doesn't have access to the Internet and doesn't even know that this is out there, how would they know to ask for a written request?

A. Well, it just -- you know, by word of mouth. I mean, if they were looking for information about, you know, what's DDSN's position on abuse and neglect, you know, where would I go to find that information, they wouldn't have to know to ask for something specific like a Electronic Communication System. We've had plenty of people request these documents that we have provided.

Q. Would you agree with me that the fact that some people are requesting documents is not necessarily an indication that all interested parties would know about the documents?

A. Oh, yes.

Q. Okay. Go back to A as in apple, if you would, Kathi.

A. Okay.

Q. And when it says a minimum of 30 calendar days will be the default, help me understand what that means.

A. In other words, if -- there have -- there could be instances where people don't post it long enough to get enough feedback or to allow sufficient time.

Q. Right.

A. I wanted to make sure that in this process that there was a minimum of 30 days allowed for that.

Q. Okay. And is there -- this is part of a question you and I talked about earlier, how is it that you -- you know that that is, in fact, the standard that is applied?

A. Because of the Electronic Communication System coordinator.

Q. So the ECS coordinator -- well, let me ask another way. What is it that you think the ECS coordinator is directed to do here?

A. To manage the system.

Q. Okay. And managing the system in the context of the policies that you and I are talking about means what here?

A. It means that the time frames for reviewing a document are being adhered to and that the directives are being placed on the Web site for the minimum of 30 calendar days, that sort of thing.

Q. Okay. I asked this earlier but I want to make sure maybe this is the person that has it. Is there an internal procedure that someone would know, all right, I'm getting ready to take a look at this and here's my checklist, and I'm going to make sure that they gave 30 days and they did these various things. Is there such a checklist in the possession -- I think you indicated you didn't have one, but would this --

A. I don't know what she uses to manage the system.

Q. Okay. So have you as the head of Office of Policy audited compliance with the directive on directives?

A. Yes.

Q. Okay. Tell me how you do that.

A. Because I get a statement periodically. I think I mentioned this before where I ask which directives are up to date, which ones are near, you know, the date for review, which ones are dated, that kind of thing. And so I get a periodic report of where things stand.

Q. Okay. Do people -- who's responsible for a directive that's not up to date?

A. Well, that's a good question. It's --

I've had some leverage when it's outside my, you know, direct line of authority. So in most cases it would eventually be the State Director.

Q. You and I have talked about that organizational chart, are we now talking about those lines of boxes that are not included in your line of --

A. Authority.

Q. -- subordinates?

A. Yes.

Q. Have you had to go to the State Director to request assistance in getting compliance with directives in other lines?

A. Yes.

Q. And did you get what you were looking for?

A. To a certain degree. I got progress.

Q. Is that another way of saying you're getting there?

A. Yes.

Q. Okay. Who maintains a -- obviously y'all are moving because of the electronic world as I'm reading this exhibit, which is -- you and I are now talking about Exhibit No. 8.

Does your system -- does your data

collection system maintain copies of all directives both in original and in revised form or does your system only reflect whatever the current directive says?

A. No, we keep the other documents according to a record retention schedule that we have.

Q. Okay. And a record retention schedule is generally understood to mean that at some point material begins to be deleted because of passage of time or whatever. Am I understanding that correctly?

A. Yes.

Q. Do you know what that time period is?

A. Maybe it's six years.

Q. Okay. But you're -- you're not sure. And I'm not trying to hold you to it.

A. Yeah.

Q. I'm just trying to understand.

A. Yeah.

Q. So to the extent that you and I were having a conversation in your office, the material that you could discuss with me might necessarily be limited by whatever the retention schedule is and that may or may not be six years but it's some time

period?

A. Right. There's Medicaid, you know, is our, you know, contract with them and our biggest revenue source so we typically follow what their guidelines are for records.

Q. Okay. Go back if you would for me, Kathi, we're still on this Exhibit No. 8. And look at -- look at Page No. 4 of 11, it is in the definition area. And I'm looking again at the definition.

A. Uh-huh.

Q. This departmental director a mandate approved by the State Director or the Commission Chairman. Is a mandate different than a policy?

A. You know, it doesn't say policy approved by the State Director. Department directive is --

Q. I know, and that's --

A. -- no, I don't think you can interchange that.

Q. Okay. A mandate. And where is the source of the authority for a mandate by the State Director or the Commission Chairman?

A. Well, the State Director is, you know, responsible for the day-to-day operations of the

agency and has authority to mandate, create, direct, authorize, et cetera.

Q. Okay. I have gone back to this because as we have seen immediately above a Commission policy is a policy or philosophical statement. And then -- but I'm -- I'm trying to understand to the extent that the directives are not approved by the Commission, this directive on directives includes the Commission Chairman. Is that a result -- I mean, did you draft this, by the way?

A. No.

Q. Okay.

A. I think that definitions have been there for, you know, since the inception.

Q. '87?

A. Yeah.

Q. Okay. And any revisions that have taken place, have any of them included changes to these definitions?

A. Well, I would think so because a Commission policy -- we used to be called the Department of Mental Retardation so I would think that there's been some update to that kind of thing.

Q. Remind we what that time frame is when the change of name?

A. '93.

Q. And at that point, you were working for Department of Mental Retardation, correct?

A. No, I was in graduate school.

Q. Oh, that's when you were in graduate school.

Based on your own memory, and I'll look at it later, I won't take time on it, but does the Commission policy or philosophical statement, which you were kind enough and you referred me back to that Web site which we referenced as Hearing Exhibit No. 1. Do you know of your own knowledge, and that's all I need at this point, do you know of your own knowledge whether the Commission itself has authorized the Chairman to sign off on directives mandating certain actions?

A. Do I know if the chairman knows?

Q. No, if the Commission itself has adopted a policy authorizing the Chairman to sign as approving a departmental directive?

A. I don't know.

Q. Okay.

A. I mean, it might be in one of the CPs. I don't know.

Q. Okay. I'm asking what you know. I'm

not --

A. Yeah.

Q. I'm not asking -- and I'm not asking you to surmise. I thought you might know.

All right. Let's now go to what I think is a subcomponent of this same area of questions. Go to the last page, Kathi.

A. Okay.

Q. I'm trying to put all these pieces together because now we're talking -- we're now on Page 9 of 11. Are you where I am?

A. No.

Q. Okay. Look at 9 and 11. 9 of 11, excuse me.

A. Okay.

Q. Look at the bottom of the page.

A. Uh-huh.

Q. We're talking about -- at this point we're now literally in the sort of formating what a document will look like. I'm assuming you're trying to have some common format so people will sort of immediately know what they're looking at.

A. Uh-huh.

Q. All right. Now, the body of the document will follow. There may be one or two

signatures at the end depending on the originator. Commission policies will be designed by the Chairman and any other member warranted. Are you aware of policies that have been signed by -- I mean, members referring to members of the Commission?

A. Do I know of policies that's been signed by members of the Commission?

Q. Yes, I'm just looking at this wording.

A. Other than those two?

Q. I'm trying to understand what it means.

Before now we've talked about needing the signature of either the Director or the Chairman and now I'm seeing language that says that now it can be signed by the Chairman and -- and any other member warranted. And what other member are we talking about?

A. It depends on who might have been -- the Chair might have delegated to a committee to develop a directive.

Q. Okay. But the question I'm asking is is the reference to member a member of the Commission or a member of some other member entity?

A. Oh, no, the member of a Commission.

Q. Okay. And then it says departmental directives, the DD's that originate with the State

Director will be signed by the Director.

Now, give me an example of a directive that originates by the State Director because as I understood it, even directives either had to be signed by the State Director or signed by the Chairman and this appears to be saying something else or maybe I'm not --

A. No, the --

Q. -- reading correctly?

A. Right, I think the latter is the case.

Q. Okay.

A. The originator is somebody who takes responsibility for -- it describes who they are in another part of the directive. And it's usually somebody that reports to the State Director. And in those instances where the State Director originated, which is very uncommon, and I can't tell you of one that he's the only one whose signature is on a directive, there would be no other need to have anybody else's signature on the directive.

Q. Okay. We're still together.

A. Okay.

Q. So but again, maybe I have misunderstood. I thought that all directives ultimately needed to be signed off by the director.

A. Correct, and they are.
Q. Regardless of -- okay.
A. They are.
Q. And but so this tells me all directives are signed by the Director which is his way of knowing what directives are out there?
A. No, which -- because he has final authority on ensuring that the directives are following the Commission policies and what they have communicated to him as their employee.
Q. And I'm not trying to -- I'm truly not trying to beat a dead horse, it may be dead, I just haven't heard the final whinny so let me try make sure.

If there is a directive -- if there is a directive, there can be directives out there that bear the signature of subordinate to the State Directory and they are binding directives?
A. No, I didn't say that.
Q. Okay.
A. The directives -- you need to describe what you mean by binding but the -- all directives are signed by the State Director and by the originator and the originator can be somebody other than Kathi Lacy. If you look on that organizational

chart, there are other people that report to the State Director.

Q. And I saw that.

A. Okay. Okay.

Q. So by looking at a directive, just under what you've told me, I would know who originated it.

A. Yes.

Q. Because if there's a signature other than the Director, that signature will be whoever was taking responsibility for creating the directive, am I now got this straight?

A. Yes. So if you go to the front page of 100-02-DD, you'll see that I was the originator of this thing and Dr. Butkus approved it.

Q. Yeah, and I was going to go -- just that's exactly where I was going next.

A. Okay.

Q. Very -- you're good.

A. All right.

Q. So that's -- you have now -- this is -- you've now taken me where I wanted to go.

A. Okay.

Q. Bless your heart.

A. Okay.

Q. So by looking at this document, the directive on directive is a -- its current manifestation is a result of decisions you made and Dr. Butkus approved.

A. The current revisions, yes.

Q. Right. Okay.

A. That's right.

Q. You need to be proud of me. I'm doing good.

So then going back to -- going back to Page 7 of 11, Paragraph A as in apple. You are the one that has concluded and has been signed off by Dr. Butkus that the Web site is the approved method of disseminating information to interested parties.

A. Yes. And I believe that this change was made as a result of the Legislative Audit Council's audit.

Q. Right. Right. Did you consider other forms of dissemination of information and rejected them or you just hadn't thought about it?

A. It is what the LAC asked us to do.

Q. Okay.

A. So we were following their recommendation.

Q. Okay. And did you understand them to

not want you to post proposed directives in locations or it just didn't come up?

A. It never has -- it was never a consideration, posting a directive.

Q. Okay. So in fairness to you, it's not like, well, Steve, I thought about it and by damn I didn't want to do it?

A. Right.

Q. That's just not an issue that's come up?

A. Right.

Q. Okay. Let us now go -- I want to got to the Complaint.

MR. WOODINGTON: Do you want to continue or take a break?

MR. HAMM: We can take a break any --

THE WITNESS: I'm okay for a little while. Yeah, I've got an infected eye, obviously.

MR. HAMM: I have been there.

THE WITNESS: Yeah.

MR. HAMM: I've been there. And you're welcome to break at any time, Kathi.

MS. HILL: Because we've been going about over an hour.

THE WITNESS: I'm okay. I mean, I --

MR. HAMM: I'm going to be good for a little while then I'm going to need to take a break.

THE WITNESS: Okay.

MR. HAMM: I don't know about --

MR. WOODINGTON: Let's go about 15 more minutes.

MR. HAMM: All right.

THE WITNESS: Yeah.

MR. HAMM: All right. It is -- so that we're clear, it's my intention to get this done today. This is not --

MR. WOODINGTON: I hope so, yeah.

(Off-the-record conference.)

BY MR. HAMM:

Q. So let us now mark as the next Hearing Exhibit, which I believe will be No. 9.

(PLF. EXH. No. 9, Lawsuit Filed, was marked for identification.)

BY MR. HAMM:

Q. Do you recognize this document that I've just handed you, Kathi?

A. Yes.

Q. And I know you admire it for it's brilliance and clarity of thought, would that be true?

A. Yes.

Q. Good. You're wonderful.

Okay. On a more serious note, is the document I've handed you, despite the remarks of your now semi-distinguished counsel -- it is the lawsuit filed by Protection and Advocacy as well as on behalf of individuals who are listed by initials, against the department -- DDSN, Dr. Butkus and then existing members of the Commission?

A. Correct.

Q. Yes. And you've already told me that you saw this document sometime after it was served.

A. Correct.

Q. All right. I do not intend to go through all the provisions of it, just for your information, but I do want to -- as I heard your earlier testimony, you already testified that you advised Dr. Laurent with regard to your opinion of what the statute required with regard to regulations, do you remember that answer?

A. Correct, yes.

Q. Okay. And I have also understood you to say that you in your role as the head of the Office of Policy are opposed to the promulgation of any regulations beyond what exist.

A. I didn't say I was opposed.

Q. Okay.

A. I said I think that we have a vehicle that accomplishes the same thing.

Q. Okay. Well, we've already -- you have already acknowledged that your current -- are you aware that the process referenced in your directive since you're the one that originated it, the directive on directives, that the notice provisions are different than the notice provisions of regulations? Are you aware of that?

A. I would assume they're different.

Q. Okay. So you have -- and I recognize you're not a lawyer and I'm not trying to make you one. But you have concluded that any additional notice requirements of the Administrative Procedure Act should not apply to directives?

A. No, I'm saying I -- we haven't either thought about it or done it or anything in between.

Q. Okay. So that's simply not an issue that you've considered for purposes of trying to render an opinion one way or the other. Is that fair based on what I just heard you say?

A. That I haven't given it consideration? That I haven't --

Q. Well, you haven't thought about it in such a way that, okay, Steve, I've thought about and I reached the following conclusions. Again, I'm not trying to put words in your mouth but I think that's what I heard you say and if I'm wrong --

A. Well, my job is to follow what, you know, the State Director asked me to do.

Q. Right.

A. Based on what he gets from the Commission.

Q. Okay.

A. And so the assumption there is that we were following the wishes of the Commission since there have been no promulgation of regulation issued since I've been at the department.

Q. Okay. And when you -- of course you've been at the department since 1996, is that the time frame you're referencing?

A. Well, I also worked there previously.

Q. Okay. So at least since '96, then, your answer would apply?

A. Yeah.

Q. Let's now talk about the enforceability of a directive.

A. Okay.

Q. What is your understanding the directive on directives gives a 30-day default period, yes?

A. Yes.

Q. So does that mean that under the directive on directives within a 30 -- after a 30-day period, a directive may be changed?

A. Could you ask that again.

Q. Be happy to. There is a -- there is an existing directive, one -- someone in your system determines we need to change it. Your directive on directives says we're going to utilize the Web site as the vehicle to put out notice, yes?

A. Yes.

Q. Okay. And then it contains that language, and maybe it would be helpful for me and you to look at, again, 100-02-DD, which is the one that shows you're the originator -- and when I say it's your document, I'm not -- I'm not trying to tard fed you with your document. But under your system, you have organizational responsibility for it.

And we've talked about Page 7 of 11 that before the document with any major changes highlighted and allowing sufficient time for

feedback, a minimum of 30-calendar days will be default, and I understood in an earlier question that you couldn't change it without that 30-days. That that was the minimum time period before the directive on directives would allow a directive to be changed.

A. That's the -- that's the typical -- that's the routine.

Q. Okay.

A. That directives have been issued without -- under a 30-day period of time.

Q. In less than 30 days?

A. Yeah.

Q. So this directive when it says a minimum of 30-calendar days will be the default is, in fact, not a final and binding position for DDSN?

A. Right.

Q. Okay. So to the extent that someone thought they had 30 days and saw this --

A. It would be posted with the directive so that they would know they had under 30 days if we did that.

Q. Okay. And you just told me you have done that.

A. I believe we have sent one out that --

and I'm trying -- I can't even think which one it was.

Q. All right. We'll give you a moment to think.

A. But we did -- we did put one -- I'm not going to be able to do it.

Q. Okay.

A. I do so much during the day.

Q. I am not expecting you to be a human encyclopedia.

A. I mean, I can get it for you but --

Q. Well, maybe through your counsel let me ask that you do that simply because it will help me understand what you're referring to.

A. Okay. Sure.

Q. But I don't expect you to.

MR. WOODINGTON: So just so the record is clear, we're trying to locate one where --

THE WITNESS: Less than 30 days.

MR. WOODINGTON: -- where the posting, the original posting --

MR. HAMM: Was less than 30 days.

MR. WOODINGTON: -- has less than a 30-day period stated on it.

MR. HAMM: Yes.

THE WITNESS: And an example of that -- I mean, I did think of it. How about that?

BY MR. HAMM:

Q. I'm impressed. Go for it.

A. The directive on abuse and neglect and exploitation.

Q. Okay.

A. I believe that was the one that it was. And when the law changed, the -- we tried to incorporate those changes to the law that happened in January or were implemented in January 2007. And then there are times, you know, where that directive has been reviewed, clarification has been added. And there are times when after meeting with the unit, the SLED organization, we have had to issue something very quickly without getting comment because this is what SLED asked us to do.

Q. Okay.

A. So there would have been an occasion that we did not give people an opportunity to comment but to say there has been a change in practice with how reports are submitted and that kind of thing. That's an example.

Q. Okay. So again, the directive on directives, Page 7 of 11, does not within itself --

A. Right.

Q. -- authorize or suggest or recognize that there may be circumstances where the 30-day standard will not apply; is that correct?

A. Yeah.

Q. Okay.

A. And I think we didn't think about that at the time that we updated this directive so I might have to go back and update it.

Q. Okay. Now, let's say a directive -- what is the enforceability of a directive?

A. It depends on which one it is.

Q. Okay.

A. If I use the abuse and neglect one, have a division of quality management, every report that gets submitted to SLED is simultaneously sent to the department, we make sure that it's complete, accurate, that the correct personnel action has been taken and that type of thing. So we do a prospective review and then we also do a kind of a concurrent and a post-review, looking at trends and analyzing what's going on in organizations. So there's all kinds of ways to look to see if the directive is being carried out as intended.

Q. Okay. Let me -- obviously, you're much

more familiar with your system than I am. Let's say there's an existing directive and someone is -- to whom the directive applies and is changed and for purposes of my -- we'll make this a hypothetical.

The directive is changed, whoever doesn't know it and they say, wait a minute, we -- we didn't know about this change, you shouldn't apply the new one to us. What is the -- I didn't see anything there about someone who would claim, well, we didn't even know the directive changed.

A. They would always know that the directive changed because we've got confirmation that e-mail was sent to the distribution list and they received it.

Q. Okay. And again, I'm now thinking about a family who has a member that receives services to which a directive might change something and they didn't know about it, what is --

A. Like a -- like a -- can you give me an example?

Q. Yes, I think I can. In fact, let's go to the pleadings and see if we can't do it that way.

A. Okay.

Q. Let me find that, if I might. Okay. Okay. Yeah. If you would, Kathi, go to the bottom

of Page 5, Paragraph 17.

A. Uh-huh.

Q. Then it's then going to go on to Page 6 and I want to take a break.

(Off-the-record conference.)

BY MR. HAMM:

Q. Prior to the break I gave you a copy of the Complaint filed by P and A in this case and I asked you to take a look at Paragraph 17. I will represent to you that in the preparation of this complaint we met with families for purposes of creating this document. And Paragraph 17 alleges that there was a change in policy which eliminated this individual's eligibility to receive certain services.

Now, I had asked you earlier today whether changes in policies might eliminate existing services and, quite honestly, I don't remember what you said so I don't -- I do not want to be trying to put words in your mouth. I think you may have said, well, no, we don't do that. But let's just look at the allegation here.

I am -- for purposes of the question, I will represent to you that these individuals and guardians knew nothing about the change in the

policy and that resulted in a change of eligibility. And is that an allegation that you've ever heard before?

A. I don't understand the dynamics. I mean, it's not enough information.

Q. Okay. Well, we'll have some depositions that will -- again, I'm not -- I'm not trying to surprise you. I'm just trying to --

So taking for purposes of this discussion, if a family did not know that services that their -- that someone in the family was eligible to receive were changed and they were no longer eligible to receive them, that is not a generic circumstance that you have any familiarity with as the head of the Office of Policy?

A. Not through the department directive process, no. If the person is in an SLP II, then that person is getting something called residential habilitation. And residential habilitation has a definition around it. And those definitions are approved by the Medicaid Agency here in South Carolina and also by the Centers for Medicare and Medicaid Services. So we just can't up and change something without going through a pretty extensive process.

Q. And I under -- and I'm not quarreling with that answer.

A. Uh-huh.

Q. What I'm asking is would it surprise you that since I already know from the directive on directives that the only way that these potential changes are being posted is in the Web site --

A. No, sir, you --

Q. -- that a family might not know?

A. -- you're misunderstand the department directives.

Q. Okay.

A. Okay. We have a contract with the providers that spells out what we are buying, how much we're buying and what our expectations are. There's a set of service standards that are also posted on the Web site and available. Service coordinators use them, residential managers use them, executive directors use them to carry out their responsibilities. Okay, it could be like a doctor using a manual for filing and billing insurance. There are rules that you have to follow. Okay?

So these manuals are available for anybody and most of that information is provided

through our service coordination system which are contracted entities to DDSN. We are not service coordination agencies. Okay?

And so if -- if this person had a reduction in service, it would have been a result of his service coordinator eliminating the service from his service plan and providing the family with an opportunity to appeal that decision.

Q. Does the service --

A. It's okay.

Q. I'm absorbing what you just told me.

A. Okay.

Q. I'm going to focus on the last part of your response, Kathi, if I may. Service provider has an obligation to tell the party affected of a right to appeal?

A. Absolutely.

Q. Okay. Now, tell me -- tell me where I would find that.

A. The right to appeal? Well, it depends on what service it is. In this type, SLP II, there would be information provided to a case manager. It's a waiver requirement, it's a federal government requirement. If we say we're going to do it, you can get a copy of the waiver document. It's posted

on DHHS's Web site. A waiver manual is posted on our Web site, you can go look at it.

But the information related to what service coordinators need to do in an instance where they're reducing, suspending, terminating any service is quite clear and there are procedures for them to follow.

MR. WOODINGTON: Let me interpret for just a second. When she says waiver, are you familiar with the medicaid waiver and so forth?

MR. HAMM: I am.

MR. WOODINGTON: Okay.

BY MR. HAMM:

Q. Okay. What I'm trying to be clear on is there a uniform document that is given to the individual receiving the services that are about to change? Is it --

A. Absolutely. I mean, you can't go change a service on a person's plan without notifying them as to the reason why. Medicaid is a medically, you know, necessary, you know, insurance type and so there are rules that you have to follow.

And if services are no longer medically necessary or if a service coordinator wasn't following the rules to begin with and was

authorizing stuff that was a duplication of services that were already being provided, anything along those lines, then the family has a right to appeal anything that we do to suspend, terminate or reduce services. And that information is provided in writing to the family.

Q. Okay. Is that information the subject of a directive?

A. It's -- that information is in a service coordination manual. There's something called a Mental Retardation Related Disabilities Manual. It's on the Web site. They're, you know, available for download review. You can ask your service coordinator for a copy. You can -- you know, just all kinds of ways you can retrieve information that you're interested in knowing about.

Q. So do you know anything about a change on the issue of 24-hour-a-day on-site supervision that was changed?

A. No, I don't.

Q. Okay.

A. We -- not related to an SLP program. I'm not exactly sure what that's about. There -- we made a directive change in accordance with -- changed it to the amount of supervision that a

person needs instead of calling it accountability of consumers. So it went from a directive called accountability of consumers to supervision of consumers and I'm not exactly sure what this is referring to.

Q. Okay.

A. To be honest with you.

Q. Okay. That's fine.

A. Okay.

Q. Is it accurate that DDSN has not promulgated any regulation under the APA with regard to the operation of SLPs?

A. There is no requirement, yes. There is no requirement that we do so.

Q. And I understand -- I understand that --

A. I know, but you keep repeating stuff so I just want to keep repeating myself.

Q. Oh, that's fine. That's fine.

A. Okay.

Q. And you're welcome to do that.

A. Okay.

Q. I'm not -- again, I'm not trying to put words in your mouth.

Remind me, Kathi, in terms of you,

Commission, Dr. Butkus and then you and your official responsibilities as shown on that position questionnaire that you and I looked at earlier today. Help me understand what you would do if you learned that a provider had not given someone the appeal information you and I have talked about.

A. If someone did not provide appeal information?

Q. Right. If someone was not given information, what is it that you are obligated to do in that circumstance, if anything?

A. It depends on what it is. I mean, if it was a reduction, termination or suspension of a service, then we would make it right.

Q. What does that mean, Kathi?

A. Well, we -- someone would have to let us know that that happened --

Q. Right.

A. -- in order for us to find out.

Q. Right.

A. It's a provider responsibility. So if the call were made to me to say, you know, my service was reduced and I never got a chance to appeal it --

Q. Right.

A. -- then we have mechanisms in place to find out what the story is --

Q. Right.

A. -- because sometimes it's not always what the family member thinks it is and we get to the bottom of it and we correct whatever needs to be corrected.

Q. Well, I can tell you I used to be the head of the Department of Consumer Affairs and someone would complain and I learned that I needed to make sure I had the rest of the story. So I appreciate what you're saying but there was on occasion when the consumer was absolutely correct in whatever it was they were asserting.

A. Oh, sure, absolutely.

Q. So you determine -- in this scenario -- I want to make sure I -- let's follow this through. In this scenario, a family says, we didn't even know we can appeal, which I have had people sit in this room and tell me, so.

A. Sure. And I've had people say that too and yet I also have seen correspondence to the opposite.

Q. Okay.

A. So people don't recollect that they

always were given that opportunity --

Q. I understand.

A. -- to appeal.

Q. But --

A. So again, it's --

Q. No, I understand. I'm not -- I'm not at all quarreling. Let's just say because things -- there's an interesting bumper sticker around that I'm not going to quote but things happen. Let's say they didn't recognize those things happened for whatever reason. That they had an appeal right and the time period has passed, help me understand what happens then.

A. Well, if there is no documentation that they were informed of their right to appeal, you go one direction.

Q. Okay.

A. If there is documentation that they had to appeal, then you go in another direction. And it really depends.

Q. Okay.

A. I mean, you know, some families are -- you know, there might be some extenuating circumstances. You know, maybe they can't read, maybe they weren't -- you know, maybe they don't

remember what the service coordinator told them. Maybe they got into a car accident the next day and 30 days has come and gone and blah, blah, blah. So there's extenuating circumstances that would need to be looked into and the course of action determined.

Q. Okay. And I want to follow both of the paths you just mentioned. Let's say they didn't and then we'll follow the other.

A. Okay.

Q. They didn't. Tell me what happens.

A. So if they weren't informed of their right to appeal --

Q. Right.

A. -- then we would, you know, assign somebody to follow that case.

Q. Right.

A. Find out what -- what was suspended, reduced or terminated.

Q. Okay.

A. Okay. These are words that are commonly used.

Q. Right.

A. And find out how long they have not been being provided or reduced or one of the others.

Q. Okay.

A. And restore the service. And get the plan corrected and then --

Q. Terminated.

A. And then -- no. And then talk with the family about, you know, it could have been a mistake on the service coordinator's part that services were being authorized for things for which there was not a need to find, there could have been services that were duplicative of other services received.

And in this case if it's a SLP II in companion, the SLP II definition in and of itself by what it's called residential habilitation, is, you know, contains a component of a companion. So -- so things could have been a mistake on the service -- there's all kinds. There's probably a thousand different scenarios.

So there's not really -- there's no ever simple solution. We handle each case individually, so --

Q. I'm not suggesting there is.

A. Yeah.

Q. But for example, in the circumstance that we've talked about, is there a directive or policy in order to eliminate a claim that someone wasn't advised? Do they have to sign and say, look,

I want you to understand we're following procedures. Here's a document that tells your appeal rights and I need you to sign this so I can demonstrate you got it, is that --

A. They don't have to sign it. I mean, I don't think that that is a -- is a standard. But there is information that must be documented in the record that they shared that information with the family and that written notification was sent.

Q. And again, I have been involved in some other cases where individuals falsely --

A. Sure.

Q. -- wrote down that they had a conversation or whatever, that it turned out that they didn't.

A. Sure.

Q. And that's the reason I'm asking --

A. Well, you know what --

Q. -- from you as the policy -- is there a reason that you don't ask whoever the affected party is to sign a document so you, you, Kathi, know, you know, here -- I hear you saying this, but I have a copy of the document that you signed, so --

A. Well, this is -- this is how that normally takes place. And we -- we review a

randomly selected samples of clients' file every year. Quality Improvement Organization does that for us. We don't do it ourselves so that we get reliable and valid information.

And what that does is help us look at trends and patterns that are going on in that organization or with a certain service coordinator or provider. And it -- if there is suspicion of fraud, we report it to the Attorney General's office. Actually, we report it to SLED --

Q. SLED, right.

A. -- right now and they would refer it on to the Attorney General's office. And that happens and we do detect it. But people are going to do that and -- and, you know, we haven't made it a part of our business practice because it is hard to get families to sign information because they're not home, they're unavailable, they don't come to the office, they do this -- it's impractical.

We've tried it with some other things and it becomes impractical to have a family sign information.

Q. Okay.

A. Calling on the telephone, there's probably a telephone record but we do submit

everything in writing. So there should be some sort of log at that I'm sure that you can look at each provider that we contract with. I'm sure that they have their own internal quality controls that they use in order to do that.

Q. So DDSN does not have a standard quality control on -- regardless of provider or service where there is -- I'm trying to -- you said the sort of standard practice, termination, reduction or whatever that phrase was.

A. Absolutely we do. I gave you an example.

Q. Okay. I heard you. My question is, is there a uniform directive that doesn't make any difference. If you're getting DDSN dollars, everybody does X regardless?

A. Yes.

Q. Okay. But --

A. I have said a couple of times it's in the Service Coordination Manual. Okay.

Q. But I'm trying to understand is a Service Coordinating Manual a directive?

A. No.

Q. Okay. A Service Coordination Manual -- help me understand in the hierarchy we've got

Commission policies, we've got directives --

A. Directives are those things that are, you know, so important that we -- you know, we put them aside and make them a separate thing. Standards are things that are used to guide. They're like a manual. Okay. Just like anybody uses to do their job.

You know, you might use a Code of Federal Regulations, you might use a DSM.IV to diagnosis as a physician. You use law books as an attorney. It is a guide. It is something that you use to help you do your job.

And the federal government allows states to operationalize their regulations. There's already regulations written about home community-base waivers. Okay. So there are regulations that we follow that are in the federal statute. And the federal government approves the states to implement those federal statutes. And they also require evidentiary information that those federal statutes are being followed. We have to produce that information in order to get a waiver approved.

Q. Okay. I want to -- one of the things that I was interested when I first got involved in

this matter and that is and it's quoted in one of the memorandums filed by your counsel. And that is the reference to the -- in Section 44-20-240, the business of treating individuals with mental retardation and related disabilities. You're familiar with that? With the term ---

A. In how we treat them?

Q. Pardon me?

A. In how we treat them?

Q. No, I'm --

A. Oh.

Q. What I'm trying to -- what I'm focusing on now is in the context of how the Commission policies are reflected in the directives, state law says that you must treat individuals with mental retardation and related disabilities. You're familiar with the term related disabilities?

A. Yes, sir.

Q. Okay. I know you have not promulgated a regulation on defining the term related disabilities.

A. It's in the State statute.

Q. I understand.

A. Okay.

Q. I'm just -- I know that. I'm

focusing --

A. Okay. I'm just helping you to understand that it is in the State statute.

Q. I do know. I do know that.

A. Okay.

Q. So you're going -- you're going to the question that I'm wanting you to answer. So you're attitude -- not attitude. Your position is that the term related disabilities is adequately defined in the statute?

MR. WOODINGTON: Object to the form.

THE WITNESS: No, I'm saying that the term related disability is defined in the State statute and that we also have a department directive on what a related disability is.

BY MR. HAMM:

Q. All right.

A. And how we go about determining what a related disability is.

Q. All right. And there is no -- again, for this record, there is no regulation that the DDSN has sent for promulgation of DDSN's construction of the term related disability?

A. Correct.

Q. Okay. Talk to me about -- I looked in

the statute and I didn't see anything but it's certainly possible that I missed it so you maybe can help me.

A. Okay.

Q. To the extent that DDSN decides to deny services --

A. Eligibility?

Q. Yes, ma'am.

A. Okay.

Q. Is it your position that eligibility is defined in the statute?

A. The definition?

Q. Yes.

A. Yes.

Q. For eligibility?

A. Yes.

Q. In what statute are you referring to?

A. There's a definition for mental retardation.

Q. Okay. But mental retardation includes this related disability phrase.

A. Right. And the related disability phrase is in the -- I guess it's in the Code of Federal Regulations.

Q. Right. So again, for determinations of

eligibility --

A. Uh-huh.

Q. -- I did not locate a statute that specifically outlined all the factors that might apply to determining eligibility. Did I miss something?

A. I don't know what -- I don't know.

Q. Okay.

A. I don't know what you've seen --

Q. Okay.

A. -- so unless you show me, I'm not going to be able to --

Q. Well, I can't show you what I can't --

A. -- answer.

Q. -- what I didn't find. That's all I --

A. Well, you must have found something. So I could tell you whether you were comprehensive in what you located or whether there was additional information there.

Q. Okay. Well, you have testified consistently, Steve, we don't need a regulation, we think our directives is a better path to follow.

A. I haven't said that.

MR. WOODINGTON: I object to the form.

THE WITNESS: What I've said is that

we've got other -- other ways. A directive is one of those.

BY MR. HAMM:

Q. Okay.

A. We have a contract.

Q. Okay.

A. Most -- DHEC is a regulatory agency. Does not pay its people that it regulates. So the DHEC regulatory process makes sense. DDSN has contracts with its providers. It pays its provider. So we have other ways of holding people accountable for what we're requiring.

Q. Okay.

A. Mental Health does not have regulations around eligibility. There are lots of state agencies that don't use the regulatory process but that rather use a contractual basis to do that and whatever else you want to add on to that.

But we have a multifaceted approach to ensuring that -- that people have opportunities including Protection Advocacy that have known for a while what our policy is on eligibility to -- you know, to get some more information about it, to get into debate about it, to find out what other states are doing, to provide us information, show us where

we are wrong.

There's plenty of opportunity for that. And I'm not saying that if our Commission didn't want us to promulgate regulations that I would say try to talk them out of it. I mean, that's a decision that they get to make.

What I'm saying is that when I read the Code, it is permissible. And that we do have other ways and that is what I think our Commission has chosen to do via the vehicle of my State Director in asking me to continue to write policies, directives, service standards, et cetera. The federal government accepts it. They're a major source of funding. Usually when you're funding agency likes what you're doing, you're in pretty good shape.

The Medicaid Agency looks at all of our level of care determinations where a diagnosis of mental retardation with a disability issues and we're in 100 percent compliance. So we've got somebody else looking over our shoulders to ensure that how we're interpreting and applying our own policies are being followed.

Q. You've mentioned contracts and you've mentioned directives, help me just --

A. Service standards, manuals.

Q. Manuals have --

A. Memos, correspondence, teachings, trainings.

Q. Okay. Let's hit them one at a time. Does a manual have the force of law?

A. I don't know what the force of law means.

Q. Well, let's -- give me -- give me an example of a manual then I ask can ask.

A. A manual would be, you know, to a provider of counseling services.

Q. Okay. So there's a contract and does the contract reference that they have to comply with the terms of the manual?

A. Yes.

Q. So together they constitute the agreement between the parties?

A. Right.

Q. Okay. Does an individual who receives services from that provider, can they claim -- do they have the right to claim they're not following the manual?

A. Absolutely.

Q. Okay. And how is it that the individual receiving those services would know what

the manual standards are for purposes of even knowing they're not -- either are or are not compliant?

A. Well, there's all kinds of things. I mean, their rights are shared with them. They have to document -- our contractors have to document that they share that.

Q. When you -- explain that just a little bit there.

A. You have the right to be treated with dignity and respect.

Q. All right.

A. You have the right to receive services that are meeting your needs, that are based on your preferences. We assess for all that. We take into consideration their interests, their likes, their dislikes, all kinds of things when we're putting a plan of care together. It's all in this manual about what our expectations are.

How those are carried out, are then evaluated by Quality Improvement Organization and by the Medicaid Agency and by the federal government.

Q. So we've now talked about the manuals, we've talked about directives, we've talked about contracts. What else? I'm just -- what else might

serve as a vehicle to make sure that whatever standards are being complied with?

A. That we know the standards are being complied with?

Q. Yes.

A. Okay. The reviews that I just talked about. We have a Quality Improvement Organization that does a random sample review of every provider that we contract with. And in addition, they go into residences and they look at the services actually being delivered to see if, in fact, the person understands what they're doing on their job.

We also have --

Q. That's the employee of provider we're talking about?

A. Yes. We also interview through this Quality Improvement Organization using a federally standardized consumer interview tool, how things are going on in that person's life, what's going well, and what changes that they would like to see made.

We also do the boards and other contracted providers are required to do their own consumer surveys to see how responsive the system is. And they're required through our retrospective review with this Quality Improvement Organization to

ensure that they're using that information and it's not just a token.

We have the Medicaid Agency that does post-payment reviews on all the services that are provided by DDSN and its contract identities. We also have CMS that comes in and does reviews and they would not renew our waivers --

Q. Remind me CMS.

A. Centers for Medicare and Medicaid. They're the branch of Health and Human Services that administer the home and community-base waivers.

So we're pretty reviewed to death. We also have licensing which DHEC does in the community residential care facilities and the institutions for people with mental retardation. And DDSN does its own licensing for the next 20 days, that will be contracted out to DHEC on August 1st to go in and to look at the plans that are in place for people in residential settings and in day program settings. And we look at what -- to ensure that those plans are being fulfilled, that progress is being made, that services are being delivered, et cetera. So we have all kinds of systems in place to determine whether or not directives are being followed.

Q. I want to talk about just so you have a

sense of what I want to get to. I want to get to the Human Rights Committee.

A. Okay.

Q. I want to get to -- I want to get to the issue of waiting list and I want to talk about -- I'm drawing a blank. Is it plan of -- what's -- I'm trying to think of the letters, Plan of Service?

A. Plan of Care. I use them interchangeably.

Q. Okay.

A. Yeah.

Q. Well, let's start with the Plan of Care and I'll try to get your -- I have it marked in this. I'm just trying to find my own note here.

Plan of Care, one of the allegations in the Complaint is that one of the parties of this lawsuit were constantly trying to get a Plan of Care established and it took well over a year for that to happen. And I'm trying to understand how is it -- how is it that it would take that length of time for that to happen?

A. I have no idea.

Q. Okay.

MR. WOODINGTON: And you understand --

just a reminder to everybody for the record, that these people are referred to by initials only. We filed a motion to make more definite and certain, which the Court denied, and we don't literally know who all these people are and probably some of them we can surmise. We don't have the information about these individuals confirmed. I doubt if she's reviewed any individual case.

MR. HAMM: And I did not expect that she would have one way or the other. So for purposes of this deposition --

MR. WOODINGTON: Okay.

MR. HAMM: -- that is not an expectation I think I can reasonable apply to her. And for the record, we're not attempting to do that with her. But she is the witness by her own job description, her job title, she is responsible for implementing policies and directives and that's what I'm trying to --

THE WITNESS: I'm not responsible for implementation. I've never said -- I am responsible for making sure that -- that's David job in operations.

BY MR. HAMM:

Q. All right.

A. Okay.

Q. Let me rephrase that --

A. Okay.

Q. -- so I speak accurately.

A. Okay.

Q. You are responsible for the creation ultimately of directives and you report to the State Director on the issue of directives and others implement those directives. Is that --

A. That's right.

Q. So I did understand?

A. Yeah, others implement.

Q. No.

A. Okay.

Q. And that's what I said.

A. Okay. I thought I heard you say and implement.

Q. No, no, no, no, no. I --

A. Excuse me.

Q. No, I have not -- I have never heard you say today --

A. Okay.

Q. -- I would have loved to have you say that, but you did --

A. Okay, right.

Q. Fair is fair. You didn't say that.
A. All right. Number 14 is -- looks like is the person you're talking about.
Q. All right. Let me look --
A. JB, it's at the bottom of that last paragraph. For over a year --
Q. Yes, yes, yes.
A. -- JB was trying to get a Behavior Support Plan developed.
Q. There, that's what I'm looking for.
A. Right. And at DDSN, if -- I'm trying to -- he was in a community training home -- DDSN does not operate a community training home.
Q. Nor do you fund one?
A. No, we fund one. But it says DDSN failed to develop the BSP. We're not responsible for developing BSPs. It's a little --
Q. Okay. I understand.
A. It's worded a little interesting.
Q. Well, let me -- let me go back to my understanding --
A. Okay.
Q. -- having been involved with Jo Anne and some others in the drafting of this.
A. Okay.

Q. And this goes -- let me tie in what I -- sometimes I'm trying to repeat what I've heard you say in fairness to you so you can say, well, Steve, you didn't hear me correctly. So let me -- let me go back through this.

A. Uh-huh.

Q. In Paragraph 14, I understood that this community training home was, in fact, funded by DDSN and that one of its obligations was, in fact, to timely develop a Behavior Support Plan.

A. No.

Q. So --

A. That's in a contract relationship with our providers.

Q. So --

A. They operate the home, they deliver the service or they arrange for the service to be delivered. In this case, most of the DSN boards and private residential habilitation providers that operate CTH IIs also do not provide behavior support services.

Q. So --

A. They are --

Q. So does that mean -- excuse me.

A. There's a list of qualified providers

for behavior support and the service coordinator along with the residential staff are responsible for trying to, you know, authorize the service and get a service in place.

Q. Okay.

A. And it's been -- it's been a tough service. There's not a -- you know, a lot of providers in the state although it's getting better that do that service.

Q. Is -- let me make sure. When you contract with a provider, the provider is doing it on behalf of DDSN through the contract, right?

A. Doing -- they're providing through a contractual arrangement.

Q. Right. In this circumstance, the allegation is, and again, I'm treating it as an allegation, that these individuals went for well over a year despite raising the issue repeatedly.

A. Uh-huh.

Q. Is that because the provider didn't make sure they got to the right place? I mean, I want to -- I think I'm hearing you say --

A. Well, it really --

Q. -- don't make DDSN responsible.

A. No, I didn't say that. I said that the

wording in here was interesting because it says that SCDDSN failed to develop a Behavior Support Plan. And DDSN doesn't develop Behavior Support Plans.

Q. All right.

A. And DDSN does not authorize the opportunity for people to get Behavior Support Service. That is a job of our contracted providers.

Q. Okay.

A. So I was just, you know, probably speaking out loud about this particular person.

Q. Okay. And I'm happy for you to do that. But I'm trying to make sure -- but under the contract is there any question that in the circumstances described in Paragraph 14 of the Complaint that an appropriate BSP needed to be done?

A. Well, I don't know this person and -- I -- you know, I --

Q. Okay.

A. I would assume that this person needed something to -- because of his tendency. Tendency is kind of a questionable -- to us -- I know, tendency is a questionable thing for me to. I mean, there's all kinds of things I'd have questions about in reading No. 14 about JB.

Q. Okay. And I hear what you're saying.

I'm just trying to understand to the extent that the provider -- I understand you're saying, look, Steve, you need to understand DDS doesn't to that and I understand you.

I'm trying to understand how either the policies or the directives and the contract would put a family in the circumstance where they are regularly asking for one and it took --

A. A year --

Q. -- a year. Right.

A. -- to develop. Yes, I see that.

Q. And so my -- and here's the crux of the question, regardless DDSN funded the provider to do whatever. To the extent that, in fact, an appropriate Behavior Support Plan should have been created, help me understand where that family should have been looking to get it done in a time period of less than a year.

A. Uh-huh. Well, and again, some of these things -- you know, based on what little I have --

Q. I understand.

A. -- I'm surmising that to some degree that the Behavior Support Plan was either not put in place because of some problem with the service coordinator, you know --

Q. And the service coordinator is the coordinator in by -- of the provider or DDSN?

A. DDSN does not provide service coordination. It's all contracted out.

Q. That's what I thought. Okay.

A. So --

Q. So we're now talking about -- I apologize for -- what we're talking about right now is the provider.

A. Well, the provider of service coordination could be different than the provider of the residential habilitation service.

Q. Okay.

A. Okay. So the service coordinator for JB either was having trouble locating a behavior support provider that can do this.

Q. Okay.

A. Because there have been a lot of difficulty in finding qualified people to do this work for people with intellectual disabilities. It's a real rare gift and skill. And it could be that the service coordinator was negligent in terms of carrying out her duties. I would suspect that --

Q. Would that be --

A. -- the family would and P and A would

have carried it up the chain of command in that service coordination agency to get a Behavior Support Plan in place.

There are all kinds of things around here. And I guess, you know, from the Director of Policy perspective is that these kinds of things do happen. And what we're looking for when we do reviews is that providers have systems in place to address these kinds of things when they do happen.

That mostly the system is working and functioning well for the majority of people but you're going to have people that fall through the cracks, where we make mistakes, where bad decisions were made, where there's a rogue service coordinator, and all those kinds of things.

Q. And I understand the sort of the real world --

A. Yeah.

Q. -- having been -- I was in state government for 18 years. I think I have some exposure to the real world and providing services.

What I'm trying to understand in terms of this lawsuit is where is the contractual obligation or time period to timely provide what ultimately was provided here this.

There's right -- at the moment, simply because it took a year, that doesn't violate, as I understand it, a directive. It certainly doesn't violate a regulation because it's not there. So does that kind of delay violate any standard policies?

A. Sure.

Q. What?

A. We -- you know, it's in the Service Coordination Manual, again, that when there's a need identified, that that need, that they work, you know, diligently to get that need met. And in this case, I don't know about the diligence of the service coordinator or the supply, behavior support providers. I don't know how -- to what extent DDSN was involved in assisting --

Q. Right.

A. -- the service coordination provider in finding a behavior support provider. So there's all kinds of ways to look at Number 14.

Q. Okay.

A. I don't have enough --

Q. Okay.

A. -- detail about it. But there are things to hold providers accountable. If there is a

need on the plan and it's not being met, our Quality Improvement Organization would pick that up and would find this particular file out of compliance for not implementing a service that the consumer needed. And what we would be looking for is documentation that there were efforts in place to try to meet that need.

There are all kinds of unmet needs in South Carolina, it doesn't matter what agency you go to, where you can't find a nurse because of the geographical location, you can't find a personal care provider because there aren't enough around. There's all kinds of things and CMS understands that, Medicaid understand that.

What we're trying to do is look at a bigger picture. Are the systems working, do we have things in place to detect things like this so that we can improve upon the system. And so yes, the Quality Improvement Organization if they picked this file, as part of their random selection, would find it out of compliance --

Q. Okay. But --

A. -- for not implementing the Behavior Support Plan in a timely manner.

Q. And that is -- can I fairly reference

that as sort of an audit procedure?

A. Yes.

Q. Okay.

A. We call it a compliance, a contractual compliance review.

Q. All right. And isn't it true that an audit procedure will not necessarily look at every file or pick up every --

A. That's the beauty about statistics and random selection because what it does is it allows you to generalize your findings to the entire population so that if you're using a large enough sample that you can say within confidence, depending on what that interval is, that you have -- you can say this is how the provider is doing. And it's sufficient enough so that you know that the systems are in place or not.

Q. Okay. All I'm wanting to make sure that we -- are we in agreement that even a statistical sampling to the extent that it does not cover every file and would not necessarily uncover every circumstance that did not meet the service manual, the contract or a directive?

A. Of course.

Q. Okay. And I'm not trying to be

critical of that. What I'm trying to understand is the affected family, they don't have a copy of the manual so --

A. Well, P and A was involved, it says.

Q. I understand.

A. Okay.

Q. But they had a problem for a while before P and A got involved.

A. Oh, okay.

Q. I'm just trying to understand --

A. You just --

Q. -- under the system --

A. Uh-huh.

Q. -- to the extent that there was an applicable directory, the only -- excuse me, directive, there may be something out there but under the current system of posting them on the Web site, they may not have honestly known about it. I'm just trying to understand the sort of backup systems.

A. And there are plenty of them. And, you know -- see, I honestly don't know where you're headed with this. I wish I did so that I -- we could get to the point because this is a hypothetical situation here, I don't know who this

family is, I don't know what the circumstances were and -- and it's really difficult to talk about hypotheticals.

Q. Okay.

A. I've already talked about the multiple systems that we have in place --

Q. You have. You have.

A. -- that would -- that are in place that are sufficient that go way beyond national standards for looking not only at contract compliance but also quality of life. And I don't know how the promulgation of regulations would change that regarding this family.

Q. Well --

A. If that's where you're headed. Because I don't know what the regulation is going to do for that family if this provider is not performing. And like I said, the CRCS were not performing and DHEC could not sanction them and we try to go through the regulatory process, it failed us. And we could have used what we use in place at DDSN and it corrected that immediately.

Q. For purposes of this Paragraph 14 -- I think I understood your answer, say, Steve, we just cannot -- because of the variables we can't

require -- I mean, there may be plenty of reasons and so it may be acceptable that it took a year to do this or more?

A. I'm not saying that it is acceptable, I'm saying that there might be some mitigating circumstances here that I don't know about.

Q. Okay.

A. And I can go off in all kinds of directions and we've already tried to go into and they lead to even more paths about different scenarios.

Q. Right.

A. And you're talking about one person here. And I -- you know, we hate when stuff like this happens. If this happened that for whatever reason that we couldn't get a provider to get in there and write a Behavior Support Plan and this client needed it, then I -- I feel bad about that. I'm concerned about that. And I would ensure that either we had a system to detect it earlier, to respond to this family in an appropriate, meaningful way, that they knew about the efforts that were going on to try to intervene and that kind of thing.

So without knowing any of that, you know, I would hope that we would have been involved

to help the family.

Q. Let's talk about the Human Rights Committee. Again, my understanding that the DDSN has not promulgated a regulation regarding their authority, timing or anything else with regard to when they act or don't act; is that correct?

A. And I would say that we've not promulgated regulations because it's not required to do so.

Q. Okay.

A. Correct.

Q. And have you promulgated a directive regarding the composition, responsibilities and scope of authority of Human Rights Committees?

A. Yes.

Q. All right. Where is that?

A. It's in the directives.

Q. Okay. Tell me --

A. What number it is?

Q. Yeah.

A. It's in your menu. That was the first exhibit. I must have changed my order.

MR. WOODINGTON: Can I give you the answer?

THE WITNESS: Well, yeah, why don't you

show it to me and I'll give it to him. It's 535-02. It's called Human Rights Committee.

MR. HAMM: Give me that number again.

MR. WOODINGTON: 535-02-DD.

BY MR. HAMM:

Q. Okay. And without taking a lot of time, remind me what it says.

A. It really -- it takes the part in the State Code that references the requirement for Human Rights Committees and it, again, provides guidance to contracted providers about what their obligations are to form a Human Rights Committee, what the composition needs to be, how frequently they need to meet, what kinds of issues that they debate, the rights of the person whose rights are being challenged in some way and need to go to the Human Rights Committee, et cetera.

Q. One of the allegations in the Complaint in Paragraph 17 goes to this question of timing and that's really what I'm just trying to get clear here.

A. Okay.

Q. The Human Rights Committees don't have the authority to direct that something be done in a certain time frame and that includes the directive

as I understand it.

A. I would have to read over it to --

Q. Okay.

A. -- to give you that.

Q. And help me because maybe I missed it. In terms of -- what is the appeal process to the extent, that paragraph, that family encountered these difficulties in getting that done, what is the appeal process for that not happening?

A. For a BSP not being developed?

Q. Yes, ma'am.

A. They appeal to DDSN.

Q. Okay.

A. And then if -- if we don't satisfy them, they have a right to appeal to Health and Human Services.

Q. Okay. And to the extent a family is asserting that one of these plans needed to be developed, it's not -- you're saying you appeal to DDSN.

A. Uh-huh.

Q. Appeal in the context of this conversation means what?

A. It means that they send in why they believe that -- and in this case, it sounds like

that the BSP wasn't developed within a reasonable time frame, for whatever reason, and that they're appealing that the Behavior Support Plan has not been implemented or written or something.

Q. Right. Right.

A. Yeah.

Q. So --

A. So then they can write to the State Director and ask for a review of their complaint or their appeal and we issue a letter back in 30 days letting them know what the outcome of that is.

Q. Is the complaint or the appeal the failure of the Human Rights Committee to act or the provider to act because I thought --

A. Well, in this case it would be -- I mean, I'm not certain but if the Behavior Support Plan was not implemented in a timely fashion or developed in a timely fashion, then it would be the responsibility of the service coordinator. Because the service coordinator is the one that authorizes --

Q. Okay.

A. -- services on behalf of her customers.

Q. So the service coordinator -- is it fair for me to go coordinator/provider in this

context?

A. Uh-huh. Service coordination provider.

Q. Okay. They are the -- they, not DDSN have the authority to implore, push, demand from the Human Rights Committee action or is the Human Rights Committee --

A. I -- you know, I don't -- I don't know that --

Q. I --

A. -- Human Rights Committees don't --

Q. Let me put it -- let me --

A. -- it says Human Rights Committee has the authority to order that a BSP be developed within a certain time frame.

Q. Okay. Here, go up higher and let me tell you.

A. Okay.

Q. Because when I was preparing for this --

A. Okay.

Q. -- you have a directive that said these BSPs have got to be approved by a Human Rights Committee.

A. Oh, well, I -- I don't know about that.

Q. Okay.

A. I would like to see that.
Q. Okay.
A. Where it says -- I know that people on psychotropic medications must.
Q. Okay.
A. Just show it to me so I can see it.
Q. Okay. And I'm going to see if I can't do that.
A. Okay.
MR. HAMM: Jo Anne, do you have that?
THE WITNESS: Okay, that would be good.
MR. HAMM: Find that for me.
THE WITNESS: And instead of --
BY MR. HAMM:
Q. And that's where I'm trying to -- I'm just trying to make the connection between the provider, service coordinator --
A. Uh-huh.
Q. -- the Human Rights Committee and I'm trying to be clear in my mind and then you tell me that they can appeal to DDSN.
A. Well, all that needed to be done in this time if the issue was that somebody wanted the Human Rights Committees to have authority to -- that a BSP developed within a certain time frame is to

but put a comment on the Web site to say blah, blah, blah. I mean, you know, we think that there needs to be some more, you know, teeth to this. You know, I don't know how the promulgation of regulations like in the next sentence would have helped any of this.

Q. Okay.

A. And I know that's what this lawsuit is about so I keep going back to that. The Human Rights Committees don't have the authority to order. That's not their role. They're not an authoritarian body. What they're trying to do is protect the rights of a person. And for whatever matter that the Behavior Support Plan for a particular person wasn't developed in a timely manner does not mean that the system is flawed and that the promulgation of regulations is the answer.

What it means is that there's something that went awry that needs to be looked into and, unfortunately, it took a long time in this person's case. That is not -- that is not the practice. And we have systems in place to see whether Behavior Support Plans are being developed and implemented in a timely manner.

Q. And I'm going to hand this to you in

just a second.

A. Okay.

Q. I'm looking at just so you'll know -- in fact, why don't we just hand that to her and we'll look at it together.

A. Oh, this is the State Statute.

Q. Right.

A. Okay.

Q. Yes.

A. Okay.

Q. Let's go ahead just for purposes since we're looking at a common document, let's get it marked as an exhibit. I think it would be Exhibit No. 10.

(PLF. EXH. No. 10, State Statute, was marked for identification.)

MR. HAMM: Can we go off the record for a second.

(Off-the-record conference.)

(PLF. EXH. No. 11, Behavior Support Plan, was marked for identification.)

BY MR. HAMM:

Q. Kathi.

A. Yes.

Q. Turn to Page 7.

A. Okay.

Q. This is the basis of the allegation in the Complaint so I just --

A. Okay. Good.

Q. If you'll look on Page 7, Item 4, Behavior Support Plan Review and Approval. And then go to the second paragraph, the DDSN Board/QPL. Remind me what QPL is.

A. Qualified Provider List which doesn't really doesn't make sense but it's a qualified provider.

Q. Okay, whatever.

A. Yeah.

Q. It says: Must designate and use a Human Rights Committee to review, approve and monitor individual plans designed to manage inappropriate behavior and other plans. That is where that allegation is coming from since you were asking me.

A. That in the opinion of the committee involve risk to individual protection and rights.

Q. Right.

A. Individual plans that involve risk including but not limited to procedures designated by the Board as being restricted require consent

pursuant to.

Q. Right.

A. Okay. There's a caveat there.

Q. No, I understand that.

A. Okay.

Q. I understand that.

A. All right.

Q. I'm just -- you were asking and I wanted to at least demonstrate that we thought we were doing our homework when this was put together.

A. Uh-huh.

Q. I just wanted you to see it.

A. Uh-huh.

Q. And I don't have any -- we don't need to discuss -- I'm not asking you to interpret that. I just wanted for the record to reflect where that -- where that assertion in the Complaint came from.

And mindful of a commitment that I made to you, which I will keep -- yeah, let's go to this one next. I asked Jo Anne to go determine --

MS. HILL: This is Number 1. There were five.

BY MR. HAMM:

Q. Let's make this Hearing Exhibit No. 12.

(PLF. EXH. No. 12, SCDDSN End Policy, was marked for identification.)

BY MR. HAMM:

Q. Kathi, I think what has been marked Plaintiff's Exhibit No. 12, I asked Jo Anne because I've looked at them a while ago.

A. Okay.

Q. I understand this to be one of the policies issued by -- a policy issued by the Commission.

A. That's correct.

Q. And it shows up on your Web site as that.

A. Correct.

Q. And I noticed that this policy was created on January the 18th of 2007.

A. Correct.

Q. Okay. I want to go through all of them quickly for purposes of this exercise. I'm going to hand you what will be marked as Exhibit 13.

(PLF. EXH. No. 13, Governance Policy, was marked for identification.)

BY MR. HAMM:

Q. Which is the governance policy which was created on January the 18th of 2007.

A. Uh-huh.

Q. So we have marked Exhibit 12, Exhibit 13 -- wait a minute. This is mine. I'm looking for -- oh, here it is. That's 13. Okay, so the next one is 14.

(PLF. EXH. No. 14, SCDDSN Executive Limitation Policy, was marked for identification.)

BY MR. HAMM:

Q. I'm handing you the policy, Kathi, that was marked Exhibit 14 also created on January the 18th of 2007. Do you have that one in front of you?

A. I don't have 03. I have 02 -- 01 and 02.

Q. Okay.

MR. WOODINGTON: Now you have 03.

THE WITNESS: Okay.

MR. HAMM: And do we have one more, Jo Anne? Or there's seven, isn't there?

(PLF. EXH. No. 15, SCDDSN Commission Staff Linkage Policy, was marked for identification.)

BY MR. HAMM:

Q. So I'll now hand you what has been marked, Kathi, Exhibit 15 which was also created on January -- you can --

(PLF. EXH. No. 16, SCDDSN Public

Innovation Policy, was marked for identification.)

BY MR. HAMM:

Q. Kathi, I'm handing you what is marked 05.

A. Okay.

Q. And that has been marked as Exhibit 16.

MR. HAMM: Do I have them all?

MS. HILL: Yeah.

BY MR. HAMM:

Q. And 05 was also -- was created in October of 2008.

A. Correct.

Q. Okay. Now, let's very quickly, mindful of my commitment to you. Now, go to 01, please. What policy existed prior to January the 18th, 2007 with regard to this ends policy?

A. None.

Q. Okay.

A. To my knowledge.

Q. Okay. All right. Go to 02, please, which has been marked as Hearing Exhibit --

MS. HILL: 13.

BY MR. HAMM:

Q. -- 13. Governance Process Policy. Same question, what policy existed prior to January 18th,

2007?

A. None, to my knowledge.

Q. Okay. Look on Page 2 of that Exhibit 13, if you would, Kathi.

A. Uh-huh.

Q. The Commission will approve and adopt bylaws. Do you know whether they had bylaws before that?

A. I believe so.

Q. Okay. And that it says it's going to establish policy that govern all department directives. Okay.

Now, go to what has been marked as Exhibit 14, executive limitations policy created January 18, 2007. What policy existed by the Commission prior to that date?

A. A limitations policy? None, to my knowledge.

Q. Okay.

A. Now, there was something in place, I don't know what it was, that these were created from and I don't know that we called them Commission policies then. But something was used because all I can remember in one of the Commission meetings is that they wanted to hold on to one of them or two of

them to ensure that they covered all the necessary policy issues that they wanted to through the execution of these new policies.

Q. Well, one of the things that caught my interest in Exhibit 14, 03, was it makes -- this is -- as I understand it is sort of establishing the policies that apply to the Director. Is that a --

A. Yes.

Q. -- fair characterization?

A. Yes.

Q. And I thought it was -- it was interesting to me when I took a look at this that this references department directives. And when I was looking at Section 44-20-220, which you evidence a knowledge of, says that the department shall promulgate regulations. That's on the hiring of employees and whatever.

But this -- this policy does not make reference to the statutory obligation to promulgate regulations. And this is in a time period when you were the chief policy person. Did you have any input in the creation of this -- of these policies?

A. No, sir.

Q. Okay. Have you been involved in the promulgation of regulations under the terms of that

44-20-220 where the language talks about shall promulgate regulations?

A. I don't think the statute says shall promulgate regulations. I don't -- you need to show it to me.

Q. I can do that.

A. That will help me put it into context.

Q. I can do that.

A. Okay.

MR. WOODINGTON: Do you have the whole statute?

MS. HILL: Uh-huh. I have the whole thing.

MR. HAMM: Hand me that next.

BY MR. HAMM:

Q. Is what you do part of the operation of DDSN in your role?

MR. WOODINGTON: Object to the form.

THE WITNESS: I'm trying to respond back -- ask it again, please.

BY MR. HAMM:

Q. Yes, ma'am, I'll be happy to.

A. Okay.

Q. Is what you do part of the operations of DDSN, part of the operation of DDSN?

MR. WOODINGTON: Object to the form.

THE WITNESS: How do you define operation?

BY MR. HAMM:

Q. All right. Operation would be both. We already have in the record your job description, it talks about policies. I think there might even be -- I think somewhere in there is the word operation.

A. Okay.

Q. And I'm just -- I'm trying to understand if what you do is part of the operation of the department.

A. Well, the internal operations of the department have to do with how we carry out our job responsibilities.

Q. Okay.

A. So in that aspect, yes.

Q. Okay. And your job responsibility is as the head of the Office of Policy is to make sure that the policies of the Commission and the directives approved by the Director comply with law, statute, regulations, state or federal, yes?

MR. WOODINGTON: Object to the form of the question.

THE WITNESS: Part of my job responsibility is to ensure that we -- our policies are consistent with federal and state laws.

BY MR. HAMM:

Q. Okay. Okay. Well, let me now --

A. But I don't see operations in my --

Q. Okay. Look --

A. I'm going back to my job description --

Q. Yeah, go --

A. -- and I'm looking for it --

Q. Please, please keep looking.

A. -- and I don't see it anywhere.

Q. Okay. Are the -- do the directives of the -- that y'all deal with sort of govern the operation of DDSN as a practical matter?

A. No.

Q. No. Okay. Then let's mark as the next Hearing Exhibit which may be 17.

(PLF. EXH. No. 17, West Law Code 1976, was marked for identification.)

BY MR. HAMM:

Q. And I invite your attention simply to the first sentence.

A. Uh-huh. Okay.

Q. This is Exhibit No. 17. This is where

I'm trying to -- as a result of the conversations that you and I have had today, Kathi, I'm trying to -- Section 44-20-220, which has been marked as Hearing Exhibit No. 17, says: The Commission shall determine the policy and promulgate regulations governing the operation of the department.

And I'm trying to understand -- you have apparently offered an opinion to the current director, Dr. Laurent, and I'm trying to -- I'm focusing on the first sentence at the moment. I'm trying to understand, number one, I recognize you're not a lawyer. I'm not asking you to be one. But since you have volunteered to me that you have given some at least advice or shared your views that the statute itself talks about the shall determine the policy and promulgate regulations governing the operation of the department.

A. Right.

Q. And I was asking you just before that is what you do part of the operations of the department and I understood you to say yes, part of it. And so I'm trying to understand whatever demarcation or whatever you have reached to say, Andy, you don't have to do it.

And so all I'm trying to do right now,

again, recognizing respectfully that you're not a lawyer, that the Commission shall determine the policy and promulgate regulations governing the operation of the department. Is that part of the statute that you offered your opinion on to Dr. Laurent?

A. Yes.

Q. Okay.

MR. WOODINGTON: And I would note that every time you quoted that you've left off the last few words which are --

MR. HAMM: And I'll be happy to do that. I'm not trying to --

MR. WOODINGTON: Okay. I just want to point that out on the record.

MR. HAMM: That' fine.

MR. WOODINGTON: It says: And the employment of professional staff and personnel as well.

BY MR. HAMM:

Q. For purposes of the record: The Commission shall determine the policy and promulgate regulations governing the operation of the department and the employment of professional staff and personnel. So we're fully -- I'm not trying to

be selective in quoting.

So do you understand as the policy guru of DDSN that the operations of the department which you have told me a few minutes ago are part of what you do?

A. Well, I help carry out functions related to how the department operates --

Q. Okay.

A. -- by having management responsibilities of staff. And evaluating staff performance, ensuring that they're carrying out their job duties. That's how I look at the operation of the department in the employment of professional staff and personnel.

So I think that the governing of the operation is how we operate internally as an organization and the employment of professional staff and personnel.

So having ensuring that we've got job -- position descriptions for people, you know, ways to evaluate their performance, ensuring that they're carrying out those job duties effectively and so on and so forth.

Q. So you're construing this statute as the operations of the department -- let me ask: Why

does the department exist?

A. The -- that's also in the State Statute. We exist to provide support and services to people that have the conditions of mental retardation, related disabilities, head injuries, spinal cord injuries and promote the best interest of persons with those disabilities.

And after that the Commission in this article it says: The Commission is authorized to promulgate regulations to carry out the provisions of the chapter. So there again, it's kind of the permissive language there.

Q. So you're telling me that the directives are not part of the operation of the department?

MR. WOODINGTON: Object to the form.

THE WITNESS: Are not part of the operation.

BY MR. HAMM:

Q. Right.

A. No, because I'm -- no.

Q. So the directives are unassociated with the department and the reason that it exist and, therefore, your construction of the statute -- well, we certainly don't have to -- not trying to put

words in your mouth.

A. What I'm -- what --

MR. WOODINGTON: Object to the form.

THE WITNESS: What it reads is the Commission shall determine the policy so it is requiring the Commission to determine the policy.

BY MR. HAMM:

Q. Right.

A. It does not say and shall promulgate regulations.

Q. Okay.

A. Okay?

Q. Okay.

A. There we go.

Q. Okay. Wait a minute. Let me go back because you've told me you don't think the development of directives is part of the operation of the department.

A. In how we function, no. No. In how we function -- the directives are out there to -- the directives that I'm speaking about, how to report and neglect, is not how the department at central office functions and operates. It's what we do to ensure that the Commission policies, okay, are being carried out. And that we emphasize those things

that are in law or required or best practices and we emphasize those through directives.

Q. So tell me what -- looking at this first sentence of the statute.

A. Uh-huh.

Q. Demarcate for me the difference of why a directive is not part of the -- you've already told me the reason -- we've talked about why the department exist is ultimately to take such steps to make sure that the public who needs your services are protected, that's fair, isn't it?

A. Or supported and provide services to.

Q. Right. And I am struggling, and I'm not trying to be difficult, I'm just trying to struggle what -- how it is that in your mind a directive isn't part of the operations of the department when everything you do is focused on ultimately providing the appropriate services and maintaining the dignity of the people that you serve. And you seem to be drawing a line say, Steve, no, I cut those -- I cut those -- you know, how we run the department and our directives are two different things.

MR. WOODINGTON: Object to the form.

THE WITNESS: There's -- one is the

management responsibilities that I am responsible for to ensure that I hire professional staff to carry out the job duties that are required in order to provide services and support to people with disabilities.

BY MR. HAMM:

Q. Right. Do you have an obligation to act consistently with the directives?

A. Many of the directives do not apply to me. No. No.

Q. Okay.

A. I do not.

Q. All right. Let me --

A. I'm not obligated because I am not --

Q. -- make it a narrower question.

A. Okay.

Q. To the extent that a directive applies to you, do you have an obligation to act in accordance with those directives?

A. I don't -- you know, if we're looking at the majority of the directives, you look at their applicability and it does not say DDSN central office staff. Okay? So there are some directives that are employment practices and those are the 400 series. If you look at the menu again or the -- not

the menu but in the --

Q. Web site?

A. No. What we were going over the -- the directive of the directives and it lists the series.

Q. Right. Right.

A. 100 means this. 200. 400 serious are things that I am obligated as part of the operations of the department to carry out and that means I will not sexually harass anybody. It means that I will do X, Y and Z as an employee of the department. That is what I consider to be the operations.

Q. But didn't you also tell me that you have an obligation to make sure that the terms of the directives are complied with by the --

A. By our providers.

Q. Right.

A. Yes.

Q. And is that part of the operation of the department since you're hiring third parties by contract to provide those services?

A. I don't know how to explain it any different. I -- the operation, the day-to-day operations of the department is one of the functions that I do to carry out the day-to-day operations are, yes, to ensure that the directives are being

adhered to. Certain directives depending on the their applicability.

Q. So part of the operation of the department and your responsibilities is to ensure that third-party providers are following the standards created by DDSN.

A. Yes.

Q. Okay. Well, I want you to know that I am a man of my word.

A. Okay. Fabulous. Uh-oh.

Q. Uh-oh.

A. Jo Anne may be changing that. It is 5:00.

Q. She is reminding me. Remember our organizational chart that we were looking at?

A. Yeah.

Q. We were talking about in terms of policies, the boxes under your box, your kingdom --

A. Uh-huh.

Q. -- and I don't mean that to be smart-alecky but your area of responsibility?

A. Right.

Q. And the Associate State Director of Operations -- now, a lot of these directives deal with the process that you go through in order to

enter into contracts and do whatever. So is that series of boxes to the right of your box are they subject to whatever directives that may apply in that area?

A. No.

Q. No.

A. I mean, the same thing applies. These are -- what they're doing is ensuring that the directives are understood. Well, first of all, that the providers have them, that they're understood, that they know how to implement, et cetera.

Q. Okay.

A. So the operation is actually the operation of the provider organizations.

Q. We're about there. Yeah. Who at DDSN is most knowledgeable about the implementation of these directories or department policy in addition to you?

A. Who at the department are knowledgeable about the implementation of the directives?

Q. Yes, ma'am.

A. The implementation of the directives.

Well, there are -- it depends on which ones you're talking about. It could be the Director of Human Resources as they apply to the 400 series.

Q. Okay.

A. It could be David Goodell and the Associate State Director of Operations as it pertains and the District Directors that work for him.

Q. Okay.

A. There is a directive I think on the -- on internal audit so the Director of Internal Audit would know certain respects of that.

Q. So is it fair that it's sort of spread around depending on the directive of where it applies?

A. I think -- yeah, I think so. And then, of course, the Director of Quality Management, which fits under me, when you ask about whether or not they're being followed, you know, that's -- that's under my area in terms of measurement for certain indicators. We probably measure over 500 different things a year.

Q. All right. Who is it -- remind me, because you've made reference to someone who works directly for you that --

A. Manages the Electronic Communication System?

Q. Yes. Who is that?

A. Her name is Pam Kirbin.

Q. And how long has she been -- how long has Pam Kirbin, K --

A. I-R-B-I-N.

Q. Okay. How long has she been there?

A. She was -- she's been working for me since -- since I've been the Associate State Director of Policy. She worked under the Director of Quality Management.

Q. Okay. Let me speed up. You've indicated that in your records you'd have -- that you have the basically the various versions of directives. I'm talking specifically about 100-01 and 02.

A. Okay.

Q. Could you, through your attorney, help me get those various versions so that I could see that, please?

A. Yes.

MR. WOODINGTON: How far back is the question, I guess? Of just 100? Of just the directive on directives?

MR. HAMM: Right.

MR. WOODINGTON: Well, we can just produce whatever we have.

MR. HAMM: That's fine. That's fine.

THE WITNESS: Okay.

MR. HAMM: I'm hoping you're appreciating how limited that request is.

MR. WOODINGTON: Yes, I am. 102, right? 100-02.

MR. HAMM: Right.

BY MR. HAMM:

Q. And I also would like to have ask for your assistance, Kathi, if I could get it, and that is the Commission policies. I'm trying to sort of track down what the predecessor documents look like.

A. Okay.

Q. You indicated at least some understanding there was something or you thought there might be something that predated.

A. Yes.

Q. I mean, I was just very interested in terms of what's on your Web site. They're all -- they're all dated after we filed this lawsuit. It may be totally coincidence and if it's -- or it's not. That doesn't make any difference. I just like to see what the previous --

THE WITNESS: Oh, when was the lawsuit filed?

MR. WOODINGTON: Actually, I think they were dated a few months before that.

THE WITNESS: Yeah, January 18, 2007.

MR. WOODINGTON: It was also filed April the 7th.

THE WITNESS: That's what I was thinking. It says here it's April 5th, 2007.

MR. HAMM: I think that's right. It's -- it's after the meeting and the letter.

MR. WOODINGTON: Right.

MR. HAMM: That's -- okay. Okay. After the meeting.

THE WITNESS: The Jim Hill letter or something.

MR. HAMM: That's the meeting when we went over there was October the 24th of 2006.

MS. HILL: 5.

MR. WOODINGTON: 5.

THE WITNESS: 5.

MR. HAMM: 2005? Okay.

THE WITNESS: Yeah.

MR. HAMM: Oh, that's right. That's right. That is three days before I found out that I had cancer.

Kathi, I have nothing further. I would

like to thank you for your courtesy to me. I have certainly tried -- I hope I -- I hope you feel I've tried to show respect to you.

THE WITNESS: Yeah, I appreciate it.

MR. HAMM: I certainly wanted to.

THE WITNESS: Yeah. Yes, I can say that you've been better at deposing me than others.

MR. WOODINGTON: I have no questions.

(The deposition was concluded at 5:00 p.m.)

CERTIFICATE OF REPORTER

I, L. Skyler Hare, Certified Shorthand Reporter and Notary Public for the State of South Carolina at large, do hereby certify that the foregoing transcript is a true, accurate and complete record.

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof.

WITNESS MY HAND, I have hereunto affixed my official seal this 9th day of July, 2009 at Charleston County, South Carolina.

L. SKYLER HARE
My Commission Expires
April 20, 2019

I N D E X

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Our Mission

Our Mission and Values

The SC Department of Disabilities and Special Needs, as defined in the South Carolina Code of Law, serves persons with mental retardation, autism, traumatic brain injury and spinal cord injury and conditions related to each of these four disabilities.

VISION: ***Where We Are Going***

0917

To provide the best in services to assist persons with disabilities and their families in South Carolina.

MISSION: *What We Do*

Assist people with disabilities and their families through choice in meeting needs, pursuing possibilities and achieving life goals, and minimize the occurrence and reduce the severity of disabilities through prevention.

VALUES: *Our Guiding Beliefs*

Health, safety and well-being of each person
Dignity and respect for each person
Individual and family participation, choice, control and responsibility
Relationships with family, friends and community connections
Personal growth and accomplishments.

PRINCIPLES: *Features of Services and Supports*

Person-centered
Responsive, efficient and accountable
Practical, positive and appropriate
Strengths-based, results-oriented
Opportunities to be productive, and maximize potential
Best and promising practices.

Adopted 11/20/03

Strategic Planning

The department's strategic planning sets the overall direction for the development of programs through a multi-year period for persons with autism, mental retardation and related disabilities, brain injuries, and spinal cord injuries in South Carolina. Planning is guided by direction from the Governor and the General Assembly, and by our customer's needs and preferences and how they want to be served. It also reflects the Department's responsiveness to national trends, to advocates who promote state-of-the-art services and to citizens who require sound stewardship of their tax dollars. This provides a framework to guide agency policy and actions in terms of how to organize, fund and evaluate outcomes of services.

The planning process used to carry out the agency's mission is a continuous process. It is primarily concerned with developing organizational objectives, forecasting the environment in which objectives are to be accomplished and determining the approach in which they are to be accomplished. To be successful, planning requires an analysis of data from the past, decisions in the present, and an evaluation of the future.

The strategic planning process includes a multi-year analysis of operating budget needs and permanent improvement needs. These multi-year analyses encompass historical trends, regional center evaluations, key regional staff input, local community provider and consumer input. Once the analysis is refined the Department prepares its annual budget request for the Governor and General Assembly that includes both recurring and non-recurring items. Capital needs are stated in the Comprehensive Permanent Improvement Plan (CPIP), which is submitted to the Joint Bond Review Committee and the Budget and Control Board.

Key Strategic Goals

1. Improve the quality and range of supports and services that are responsive to the needs of individuals and families.

   a. Address critical needs of new persons in crisis situations.
   b. Provide services to persons on waiting lists.
   c. Serve new persons who become eligible.

0918

d. Allow consumers to choose the services they need from providers they prefer using individually defined resource limits.
e. Continue to move individuals from regional centers that choose community alternatives consistent with the Olmstead decision and using a budget neutral method.
f. Continue to maximize Medicaid by shifting service dollars to local operations.
g. Continue to partner with other agencies to avoid duplication and share resources as appropriate.

2. Increase accountability to all citizens of South Carolina.

a. Continue implementation of a performance measurement system linked to customer satisfaction and achievement of consumer's outcomes.
b. Enhance quality assurance and quality improvement initiatives and maintain compliance with federal standards.
c. Minimize the occurrence and reduce the severity of disabilities through primary and secondary prevention initiatives.

Opportunities and Barriers

Opportunities

1. Increase use of Medicaid funding to develop flexible in-home supports for increased individual/family independence and prevention of more costly out-of-home residential placements.

2. Strengthen technology capacities to support self-determination initiatives and create efficiencies.

3. Enhance service provider productivity and efficiency.

4. Utilize improved statewide Quality Assurance Program to determine performance in the areas of health and safety of each person, dignity and respect, personal choice, participation in the community and attainment of goals.

Barriers

1. Each month DDSN receives 400 requests from new people for eligibility and services. Turnover is very limited in the service system as severe disabilities are lifelong and many people are waiting for the essential services they need to be more independent. DDSN has 1,908 people waiting for residential services and a waiting list of 1,040 people for day and employment programs. In addition, 1,451 people with severe disabilities live at home with parents who are 65 years old or older; of these, 689 live with a parent 72 years old or older. Over 260 of these caregivers are over 80 years old. As parents age, their ability to provide care and supervision becomes more difficult, eventually impossible. When parents become ill, develop chronic diseases, need nursing home care themselves or pass away, the state must respond by providing 24-hour care for those left in vulnerable life or death situations.

2. Waiting lists continue to grow. While new service development can now occur, multiple years of budget reductions caused waiting lists to balloon. Consumer expectations for substantial growth and development of community-based services as a result of the U.S. Supreme Court's Olmstead decision are countered by the state's ability to appropriate new revenue to fund new services. This exact situation in South Carolina has led to lawsuits in 25 other states for community services for individuals with developmental disabilities. The Olmstead decision requires that waiting lists move at a reasonable pace.

3. The recruitment and retention of nurses continues to be extremely difficult in specific locations around the state. The unavailability of nurses caused by a nation-wide shortage of nurses is further complicated by

competition from nursing homes, doctor's offices, school districts, and other providers. Some of these providers offer sign-on bonuses; all offer competitive salaries making it more difficult for DDSN to attract nurses especially on the second and third shifts.

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STATE OF SOUTH CAROLINA POSITION DESCRIPTION

7400-A-001
0921

GENERAL INFORMATION

☐ OHR COPY ☒ AGENCY COPY

0 3 5 0 5 3 — Position Number	J 1 6 — Agency Code	SC Department of Disabilities and Special Needs — Agency Name
Administration/Office of Policy — Division / Section / Unit		Columbia/Richland — City / County
Kathi Kelly Lacy Ph.D. — Employee Name	4 0 — County Code	Y — Y/N Is Position in Central Office ?
Program Manager III — Current State Title	A H 5 5 — Alphanumeric Code	0 0 0 2 — Slot; 0 9 — Band
F O C — Full / Part Time Indicator	Agency Director — Supervisor State Title	U A 2 1 — Alphanumeric Code; 0 0 0 1 — Slot
0 3 7 5 0 — Hours Per Week		
1 9 5 0 — Base Hours		

OFFICE OF HUMAN RESOURCES

J 1 6 — Agency Code; A H 5 5 — Alphanumeric Code; 0 0 0 2 — Slot

Authorized Date

☐ Delegated ☐ New Position ☐ Prototype
☐ State Title Changes ☒ Update

Program Manager III — Approved State Title

Kathi Lacy — Approval Signature; 2-5-03 — Date Approved

SOURCE OF FUNDING

1 0 0 — State %; Federal %; Other %

REQUESTED ACTION INFORMATION

Update — Requested Action	N/A — Requested State Title	A H 5 5 — Alphanumeric Code
Supervisor's Signature	1/28/03 — Date	Other Required Signature; 1-23-03 — Date

E — FLSA Designation

THE FOLLOWING SECTION OF THE POSITION DESCRIPTION IS TO BE COMPLETED BY THE SUPERVISOR

1. **What are the minimum requirements for the position (Minimum requirements must at least meet the state minimum requirements for classified classes but may include additional requirements.)?**

   A Doctorate degree in the social sciences and five years of related experience; or a Master's degree in social or health sciences and eight years related experience.

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JAN 29 2003
HR CONSULTING SERVICES

2. **What knowledge, skills, and abilities are needed by an employee upon entry to this job including any special certification or license?**

   Thorough knowledge of state level policies, procedures, functions, and interagency relationships. Thorough knowledge of public sector administrative practices, procedures, and standards. Extensive knowledge of disability populations and service delivery systems; skilled developer of policies and procedures to enhance efficiency and effectiveness of service delivery system; ability to inspire and lead teams of employees to success; ability to prepare and present reports. Working knowledge of Medicaid programs including the HCB Waiver Program. Ability to develop and coordinate health programs relating to developmental disabilities.

3. **Describe the guidelines and supervision an employee receives to do this job, including the employee's independence and discretion.**

   Independent day to day work under limited supervision. Exercises a large degree of independence and discretion in decision-making authority.

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DEC 5 2008
SCDDSN
POLICY / OPERATIONS

4. **Indicate additional comments regarding this position (e.g., work environment, physical requirements, overnight travel).**

MISCELLANEOUS DATA

Employee Number

Position Dept. Number

PLAINTIFF'S EXHIBIT 12 7/9/09

PENGAD 800-631-6989

STATE OF SOUTH CAROLINA POSITION DESCRIPTION

7400-A-002 0922

1. Job Purpose:
Under limited supervision of the State Director provides leadership and management oversight to the Office of Policy, the Divisions of Mental Retardation, Autism, and Head Spinal Cord Injury, Quality Assurance, and Consumer Assessment Team. Responsible for designing and applying best practices to all program policies and ensuring that agency policies positively affect the service delivery system for all consumers.

2. Job Functions:

	Essential/ Marginal (E or M)	Percentage of Time
1. Plans, designs, and implements new program policies and procedures. Analyzes implementation of new programs and determines changes that are needed to ensure system is efficient, effective, and responsive to consumers' needs.	E	20%
2. Develops and assures a comprehensive array of community services and supports for consumers and their families.	E	15%
3. Directs, develops, and assures eligibility policies are consistent with all applicable federal and state laws and ensures practice is efficient and adheres to the written procedures.	E	15%
4. Guides and directs the Quality Assurance System for the Agency. Ensures system reliably measures adequacy of consumers' plans, implementation of plans, satisfaction of consumers and families with services and ensures system assists in development of improved practices.	E	15%
5. Provides leadership in development of strong models of teamwork and improved communication between all divisions, field offices, and providers. Directs, develops, and assesses professional staff in the implementation of programs and services.	E	15%
6. Participates in Executive Staff Meetings to advise State Director of concerns and progress; gathers sufficient data to ensure decisions are based on facts; participates in DDSN Executive Management decision making process and is held accountable for results.	E	10%
7. Assesses the satisfaction of consumers with services received; attends public hearings and advocacy group meetings to discuss their concerns; ensures the system is responsive to consumers' needs and concerns.	E	7%
8. Represents the State Director on interagency committees and meetings as requested.	E	3%

3. Position's Supervisory Responsibilities:
If this position includes supervisory responsibilities, please indicate the state title and number of positions of the three highest subordinates.

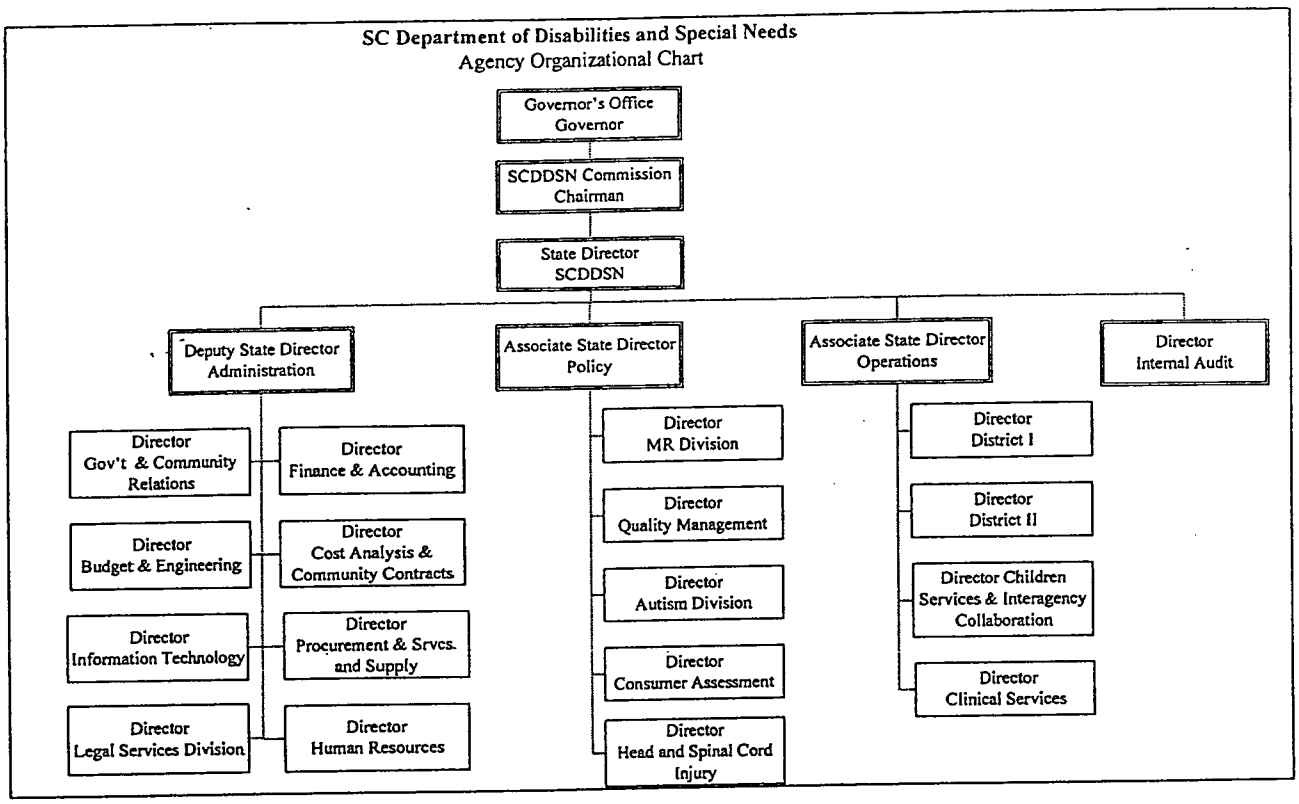
	STATE TITLE	NUMBER
(1)	Program Manager II	3
(2)	Program Manager I	2
(3)	Administrative Assistant	1

Number of employees directly supervised: 6

Total number supervised: 120

4. Comments:
Coordinates on a daily basis with DDSN Deputy State Director/Administration, Associate Director of Operations, and Provider Executive Directors.

5. The above description is an accurate and complete description of this job. [signature] Employee's Signature — 6/26/02 Date



PLAINTIFF'S EXHIBIT 3
PENGAD 800-631-6989

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND)

Protection and Advocacy for the People with Disabilities, Inc., M.J.B. on behalf of and as next friend of J.B.; C.B.B. on behalf of and as guardian of P.B.; G.C. and L.C. on behalf of and as guardian of F.C.; D.P. on behalf of and as guardian of C.M.D.; K.F. and S.F. on behalf of and as next friend of A.E.; J.H. on behalf of and as next friend of A.J.; G.M. on behalf of and as next friend of E.M.; N.M. on behalf of and as guardian of E.J.M.; R.P. on behalf of and as guardian of S.P.; R.R. and J.R. on behalf of and as guardian of K.D.R.; and J.K. on behalf of and as guardian of S.S.,

Plaintiffs,

v.

South Carolina Department of Disabilities and Special Needs; Dr. Stanley J. Butkus, in his official capacity as Director of the South Carolina Department of Disabilities and Special Needs; and Edythe Dove, Mary Katherine Bagnal, Ronald Forrest, John Vaughn, Dr. Otis Speight, W. Robert Harrell as Commissioners of the South Carolina Department of Disabilities and Special Needs,

Defendants.

Civil Action No. 07-CP-40-2187

DEFENDANTS' RESPONSES TO PLAINTIFFS' FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS

TO: STEVEN W. HAMM, ESQUIRE; C. JO ANNE WESSINGER HILL, ESQUIRE; AND JOCELY NEWMAN, ESQUIRE; ATTORNEY'S FOR THE PLAINTIFF'S

The Defendants respond to Plaintiffs' request for production of documents pursuant to Rule 34 of the South Carolina Rules of Civil Procedure as follows:

PLAINTIFF'S EXHIBIT 4 SH 7-9-09
PENGAD 800-631-6989

GENERAL OBJECTION

Defendants object to the definition of "operation," as used in Paragraph 4 of the Definitions in Plaintiffs' Interrogatories. Plaintiffs' attempt to define that term is not in accordance with the definition of that term in the pertinent statutes applicable to DDSN.

RESPONSES

1. The minutes of any meetings of the commission including, but not limited to, executive sessions and meetings of any board committees, members, subcommittees, or work groups, from the period from 1993 through present regarding the discussion of the promulgation of regulations, of the criteria for the promulgation of regulations, or any decision whether or not to promulgate regulations.

Response: (A) Defendants will make available for inspection and copying, if desired, at a mutually convenient time and place, all regular session minutes of the commission from 1993 through the present. (B) Defendants object to producing minutes of any executive sessions, on the grounds that such minutes are made confidential by law, and Plaintiffs have not shown cause why the confidentiality of such minutes should not be preserved. (C) To the best of counsel's knowledge, after due investigation, there are no minutes of "board committees, members, subcommittees, or work groups" that relate to "the discussion of the promulgation of regulations, of the criteria for the promulgation of regulations, or any decision whether or not to promulgate regulations." If such documents are subsequently located, they will be made available promptly, unless privileged, in which case a privilege log will be supplied.

2. The minutes of any meetings of the board including, but not limited to, executive sessions and meetings of any board committees members, subcommittees, or work groups, from the period from 1993 though present not produced as part of Request No.1 herein.

Response: Defendants object to this request, on the ground that there is no "board" to which it might refer. To the extent that this request is intended to pertain to the Commission on Disabilities and Special Needs, see the response to Request 1.

3. Any document on which you relied in preparing a response to the pleadings or interrogatories.

Response: Aside from statutes and other legal authorities, which are referenced in pleadings and briefs, all such documents are referenced elsewhere in these responses, except for the Position Description of Dr. Kathi Lacy, which is attached as Document 7400-A-001 – 7400-A-002..

4. Any document identified or described in the pleadings or answers to interrogatories.

Response: The only documents referenced in the Answer of the Defendants or the Answers to Interrogatories are regulations of the Department, or policies, directives or standards of the Department. Defendants accordingly object to this Request, on the ground that such documents are equally available to the Plaintiffs as to the Defendants.

5. Copies of any and all regulations promulgated by Defendant South Carolina Department of Disabilities and Special Needs ("SCDDSN") within the last fifteen (15) years.

Response: Defendants object to this Request, on the ground that such documents are equally available to the Plaintiffs as to the Defendants.

6. Copies of any and all memoranda, bulletins, reports, emails, letters, or other documents discussing whether any policies, directives and standards of you and/or SCDDSN should be or should not be issued and promulgated as regulations.

Response: To the best of counsel's knowledge, after due investigation, there are no documents responsive to this request except to the extent that Documents 7400-A-003 through 7400-A-013 may be relevant. If documents responsive to this Request are subsequently located, they will be made available promptly, unless privileged, in which case a privilege log will be supplied.

7. Copies of any and all memoranda, bulletins, reports, emails, letters, or other documents discussing whether any policies, directives and standards of you and or/ SCDDSN regarding service plans or individual service plans that should be or should not be issued and promulgated as regulations.

Response: See response to Request 6.

8. Copies of any and all memoranda, bulletins, reports, emails, letters, communications, or other documents discussing whether any policies, standards or criteria for the eligibility services offered by you or Defendant SCDDSN that should be or should not be issued and promulgated as a regulation.

Response: See response to Request 6.

9. Copies of any and all memoranda, bulletins, reports, emails, letters, communications, or other documents discussing any policies, standards or criteria for the supervision of the services offered by Defendant SCDDSN.

Response: Defendants object to this request as overbroad, because it is not limited to the issues in this case, but instead seeks any and all documents that discuss the substance

of the described policies, standards or criteria themselves, rather than the issue of whether the described policies, standards or criteria should be promulgated as regulations, or other similar issues. If Plaintiffs will re-formulate this request so that it is more narrowly drawn and limited to the issues presented by this action, Defendants will respond accordingly.

10. Copies of any and all memoranda, bulletins, reports, emails, letters, communications, or other documents discussing whether any policies, standards or criteria for the eligibility, operation, standards of supervision, and/or reporting procedures for residential services or residential programs should be or should not be issued and promulgated as a regulation.

Response: See response to Request 6.

11. Copies of any and all memoranda, bulletins, reports, emails, letter, or other documents since 1993 to present regarding the standards, procedures, or criteria for eligibility of the services offered or provided by you or Defendant SCDDSN for individuals believed to have mental retardation, a related disability(s), head injury, spinal cord injury, autism, and for an individual who is an infant at risk of having a developmental disability.

Response: Defendants object to this request as overbroad, because it is not limited to the issues in this case, but instead seeks any and all documents that discuss the substance of the described policies, standards or criteria themselves, rather than the issue of whether the described policies, standards or criteria should be promulgated as regulations, or other similar issues. If Plaintiffs will re-formulate this request so that it is more narrowly drawn and limited to the issues presented by this action, Defendants will respond accordingly.

12. Copies of any and all memoranda, bulletins, reports, emails, letters, communications, or other documents discussing whether any standard, procedures or criteria for the eligibility of services offered or provided by you or Defendant SCDDSN for individuals believed to have mental retardation, a related disability(s), head injury, spinal cord injury, autism, and for an individual who is an infant at risk of having a developmental disability should or should not be issued and promulgated as a regulation.

Response: See response to Request 6.

13. Copies of any and all memoranda, bulletins, reports, emails, letters, communications, or other documents regarding the standards, procedures, or criteria for filing, making or lodging of a complaint and/or grievance against you or the Defendant SCDDSN.

Response: Defendants object to this request as overbroad, because it is not limited to the issues in this case, but instead seeks any and all documents that discuss the substance of the described policies, standards or criteria themselves, rather than the issue of whether the described policies, standards or criteria should be promulgated as regulations, or other

similar issues. If Plaintiffs will re-formulate this request so that it is more narrowly drawn and limited to the issues presented by this action, Defendants will respond accordingly.

14. Copies of any and all intra-agency memoranda, bulletins, reports, emails, letter, communications, or other documents discussing whether any standards, procedures, or criteria for filing, making or lodging of a complaint and/or grievance against you or the Defendant SCDDSN should be or should not be issued and promulgated as a regulation.

Response: See response to Request 6.

15. Copies of any and all memoranda, bulletins, reports, emails, letters, communications, or other documents regarding the standards, procedures, or criteria for filing, making or lodging and appeal for any decision by you or Defendant SCDDSN.

Response: Defendants object to this request as overbroad, because it is not limited to the issues in this case, but instead seeks any and all documents that discuss the substance of the described policies, standards or criteria themselves, rather than the issue of whether the described policies, standards or criteria should be promulgated as regulations, or other similar issues. If Plaintiffs will re-formulate this request so that it is more narrowly drawn and limited to the issues presented by this action, Defendants will respond accordingly.

16. Copies of any and all intra-agency memoranda, bulletins, reports, emails, letters, communications, or other documents discussing whether any standards, procedures, or criteria for filing, making or lodging of and appeal for any decision by you or Defendant SCDDSN should be or should not be issued and promulgated as a regulation.

Response: See response to Request 6.

17. Copies of any and all memoranda, bulletins, reports, emails, letters, communications, or other documents regarding the standards, procedures, or criteria for the eligibility and receipt of services from you or Defendant SCDDSN and the standards used to determine whether to continue or discontinue services to an individual..

Response: Defendants object to this request as overbroad, because it is not limited to the issues in this case, but instead seeks any and all documents that discuss the substance of the described policies, standards or criteria themselves, rather than the issue of whether the described policies, standards or criteria should be promulgated as regulations, or other similar issues. If Plaintiffs will re-formulate this request so that it is more narrowly drawn and limited to the issues presented by this action, Defendants will respond accordingly.

[NOTE:: There are no Requests numbered 18 or 19]

20. Copies of any and all memoranda, bulletins, reports, emails, letters, communications, or other documents present discussing whether any standards, procedures, or criteria for the eligibility and receipt of services from you or Defendant SCDDSN and the standards used to determine whether to continue or discontinue services to and individual should be or should not be issued and promulgated as a regulation.

Response: See response to Request 6.

21. Copies of any and all decisions, policies, memoranda, bulletins, reports, emails, letter, communications, or other documents by you, the Defendants, SCDDSN, your employees and staff that expresses any intent or intention not to adopt and promulgate regulations in accordance with the South Carolina Administrative Procedures Act (§1-23-10 et. seg.) for any responsibility identified by statute or law.

Response: See response to Request 6.

22. Copies of any and all policies, directives and standards developed and/or adopted by you and/or SCDDSN relating to any services provided, offered managed, or supervised by you and/or SCDDSN or subject to the jurisdiction of you and /or SCDDSN other than that specifically requested in paragraphs 1-21. Please include any and all versions (if any) and the effective date.

Response: Defendants do not read Requests 1 through 21 as having requested copies of "policies, directives and standards" themselves. Accordingly, reading this request as seeking "[c]opies of any and all policies, directives and standards developed and/or adopted by you and/or SCDDSN relating to any services provided, offered managed, or supervised by you and/or SCDDSN or subject to the jurisdiction of you and /or SCDDSN," Defendants object to this request as it applies to current policies, standards or directives, because it requests information equally available to both parties. All current standards and/or directives of the Defendant Department are available online via the link: http://www.state.sc.us/ddsn/policies/policymain.htm. With respect to prior versions of policies, standards or directives, Defendants object to this request as overbroad, but if Plaintiffs will re-formulate this request so that it is more narrowly drawn and limited to specific prior policies, standards, or directives, to the extent that such might pertain to the issues presented by this action, Defendants will respond accordingly.

23. Copies of any and all any and all decisions, policies, directives and standards, memoranda, bulletins, reports, emails, letters, communications, or other documents by you, the Defendants, SCDDSN, your employees and staff that relate to any decision, finding determination, ruling, position, discussion, or otherwise on whether any services other that that specifically requested in paragraphs 1-21 which are provided, offered, managed, or supervise by you or SCDDSN or subject to the jurisdiction of you or SCDDSN should be or should not be issued and promulgated as a regulation.

Response: See response to Request 6.

DAVIDSON & LINDEMANN, P.A.

By: _____

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ATTORNEYS FOR DEFENDANTS

Columbia, South Carolina

December 17, 2008

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND)

Protection and Advocacy for the People with Disabilities, Inc., M.J.B. on behalf of and as next friend of J.B.; C.B.B. on behalf of and as guardian of P.B.; G.C. and L.C. on behalf of and as guardian of F.C.; D.P. on behalf of and as guardian of C.M.D.; K.F. and S.F. on behalf of and as next friend of A.E.; J.H. on behalf of and as next friend of A.J.; G.M. on behalf of and as next friend of E.M.; N.M. on behalf of and as guardian of E.J.M.; R.P. on behalf of and as guardian of S.P.; R.R. and J.R. on behalf of and as guardian of K.D.R.; and J.K. on behalf of and as guardian of S.S.,

Plaintiffs,

v.

South Carolina Department of Disabilities and Special Needs; Dr. Stanley J. Butkus, in his official capacity as Director of the South Carolina Department of Disabilities and Special Needs; and Edythe Dove, Mary Katherine Bagnal, Ronald Forrest, John Vaughn, Dr. Otis Speight, W. Robert Harrell as Commissioners of the South Carolina Department of Disabilities and Special Needs,

Defendants.

Civil Action No. 07-CP-40-2187

ANSWER OF ALL DEFENDANTS

All Defendants, and each of them, answering the Complaint herein, allege and show the following:

PLAINTIFF'S EXHIBIT 5 SH 7/9/09

FOR A FIRST DEFENSE

1. Defendants deny each and every allegation of the Complaint not hereinafter specifically admitted, qualified, or explained.

2. Answering Paragraph 1, Defendants admit that Plaintiff P&A is a private, non-profit corporation established pursuant to federal and state law. The remaining allegations of the first sentence of Paragraph 1 set forth legal conclusions which can neither be admitted or denied. Insofar as such allegations attempt to establish liability on the part of Defendants, Defendants would deny same and demand strict proof thereof. The second sentence of Paragraph 1 is denied for lack of information.

3. The first sentence of Paragraph 2 is denied for lack of information. The remainder of Paragraph 2 is merely descriptive, and requires neither admission nor denial. Insofar as such allegations attempt to establish liability on the part of Defendants, Defendants would deny same and demand strict proof thereof.

4. Paragraph 3 sets forth legal conclusions which can neither be admitted or denied. Insofar as such allegations attempt to establish liability on the part of Defendants, Defendants would deny same and demand strict proof thereof.

5. Answering Paragraph 4, it is admitted only that Dr. Stanley Butkus is the duly appointed Director of Defendant SCDDSN. The remainder of Paragraph 4 is denied.

6. Answering Paragraph 5, it is admitted that all of the individuals therein listed except Ronald Forrest are presently DDSN Commissioners. Mr. Forrest was once a Commissioner, but is no longer on the Commission. The remainder of Paragraph 5 sets forth legal conclusions which can neither be admitted or denied. Insofar as such allegations attempt to establish liability on the part of Defendants, Defendants would deny same and demand strict proof thereof.

7. Paragraph 6 sets forth legal conclusions which can neither be admitted or denied. Insofar as such allegations attempt to establish liability on the part of Defendants, Defendants would deny same and demand strict proof thereof.

8. Answering Paragraph 7, Defendants would refer the Court to the South Carolina Code of Regulations for a precise list of regulations promulgated by DDSN. To the extent that any subject area mentioned by Plaintiffs in this or any other paragraph of the Complaint is not covered by a DSSN regulation, Defendants would show that there is no legal duty to promulgate regulations in those subject areas.

9. Paragraph 8 is denied.

10. Paragraph 9 is denied for lack of information. The Defendants do not know the identities of the individual Plaintiffs.

11. Paragraph 10 is denied.

12. Paragraph 11 sets forth legal conclusions which can neither be admitted or denied. Insofar as such allegations attempt to establish liability on the part of Defendants, Defendants would deny same and demand strict proof thereof.

13. Answering Paragraph 12, Defendants reiterate and reallege each and every paragraph and affirmative defense of this Answer as if set forth herein.

14. Paragraph 13 is denied.

15. The allegations of Paragraph 14 that pertain specifically to Plaintiff J.B. are denied for lack of information. The Defendants do not know the identities of the individual Plaintiffs. The fourth and fifth sentences of Paragraph 14, beginning with "BSP's are," and "They are an integral," respectively, are admitted.

16. The first sentence of Paragraph 15 is denied for lack of information about the meaning of the subjective phrase "critically important." Answering the second sentence of Paragraph 15, Defendants would refer the Court to the South Carolina Code of Regulations for a precise list of regulations promulgated by DDSN. To the extent that any subject area mentioned by Plaintiffs in this or any other paragraph of the Complaint is not covered by a DSSN regulation, Defendants would show that there is no legal duty to promulgate regulations in those subject areas. Answering the third sentence of Paragraph 15, it is admitted that agency policies exist as guides for implementing BSP's. To the extent that policies, directives or standards are referenced in Paragraph 15, Defendants would refer the Court to the terms of those policies, directives or standards for their proper interpretation. The remainder of Paragraph 15 sets forth legal conclusions which can neither be admitted or denied. Insofar as such allegations attempt to establish liability on the part of Defendants, Defendants would deny same and demand strict proof thereof.

17. Paragraph 16 is denied for lack of information. The Defendants do not know the identities of the individual Plaintiffs. In addition, without knowledge of the identities of the individual Plaintiffs, Defendants can only deny those allegations pertaining to those individuals, their families, and/or others said to be "others like them."

18. The allegations of Paragraph 17 that pertain specifically to Plaintiff P.B. are denied for lack of information. The Defendants do not know the identities of the individual Plaintiffs. To the extent that policies or standards are referenced in Paragraph 17, Defendants would refer the Court to the terms of those policies or standards for their proper interpretation. Answering the sixth sentence of Paragraph 17, beginning with "SCDDSN has not promulgated," Defendants would refer the Court to the South Carolina Code of Regulations for a precise list of regulations

promulgated by DDSN. To the extent that any subject area mentioned by Plaintiffs in this or any other paragraph of the Complaint is not covered by a DSSN regulation, Defendants would show that there is no legal duty to promulgate regulations in those subject areas. The seventh and last sentence of Paragraph 17 is denied.

19. Paragraph 18 is denied for lack of information. Without knowledge of the identities of the individual Plaintiffs, Defendants can only deny those allegations pertaining to those individuals, their families, and/or others said to be "others like them."

20. The allegations of Paragraph 19 that pertain specifically to Plaintiff F.C. are denied for lack of information. The Defendants do not know the identities of the individual Plaintiffs. Answering the fourth and fifth sentences of Paragraph 19, which reference the DSM-IV or a condition described therein, Defendants would refer the Court to that manual for the best evidence of its contents.

21. The allegations of Paragraph 20 that pertain specifically to Plaintiff F.C. are denied for lack of information. The Defendants do not know the identities of the individual Plaintiffs. With respect to the allegations of Paragraph 20 relating to Asperger's syndrome in general, Defendants would allege in 2007, DDSN and the South Carolina Department of Health and Human Services began to implement a program to serve children aged 3 through 11 with pervasive developmental disorder. The remainder of Paragraph 20 sets forth legal conclusions which can neither be admitted or denied. Insofar as such allegations attempt to establish liability on the part of Defendants, Defendants would deny same and demand strict proof thereof.

22. The allegations of Paragraph 21 are denied for lack of information. The Defendants do not know the identities of the individual Plaintiffs.

23. The first sentence of Paragraph 22 is denied, insofar as it refers to review by the general public. In addition, Defendants deny that General Assembly review is required for standards governing eligibility and receipt of DDSN services. Answering the second sentence of Paragraph 22, Defendants would refer the Court to the South Carolina Code of Regulations for a precise list of regulations promulgated by DDSN. To the extent that any subject area mentioned by Plaintiffs in this or any other paragraph of the Complaint is not covered by a DSSN regulation, Defendants would show that there is no legal duty to promulgate regulations in those subject areas. In addition, Paragraph 22 sets forth legal conclusions which can neither be admitted or denied. Insofar as such allegations attempt to establish liability on the part of Defendants, Defendants would deny same and demand strict proof thereof. The allegations of Paragraph 22 that pertain specifically to Plaintiff F.C. are denied for lack of information. The Defendants do not know the identities of the individual Plaintiffs. In addition, the thirds and fourth sentences of Paragraph 22 are denied for lack of information. Without knowledge of the identities of the individual Plaintiffs, Defendants can only deny those allegations pertaining to those individuals, their families, and/or others said to be "others like them." Any remaining allegations of Paragraph 22 are denied.

24. The allegations of Paragraph 23 that pertain specifically to Plaintiff C.M.D. or that individual's residence are denied for lack of information. The Defendants do not know the identities of the individual Plaintiffs. Answering the fourth and fifth sentences of Paragraph 23, Defendants would refer the Court to the South Carolina Code of Regulations for a precise list of regulations promulgated by DDSN. To the extent that any subject area mentioned by Plaintiffs in this or any other paragraph of the Complaint is not covered by a DSSN regulation, Defendants would show that there is no legal duty to promulgate regulations in those subject areas. The sixth

and seventh sentences of Paragraph 23, both beginning with "Promulgation," are denied for lack of information. Without knowledge of the identities of the individual Plaintiffs, Defendants can only deny those allegations pertaining to those individuals, their families, and/or others said to be "others like them." Any remaining allegations of Paragraph 23 are denied.

25. Paragraph 24 is denied for lack of information. The Defendants do not know the identities of the individual Plaintiffs.

26. The allegations of Paragraph 25 that pertain specifically to Plaintiff A.F. are denied for lack of information. The Defendants do not know the identities of the individual Plaintiffs. The fourth sentence of Paragraph 25, beginning with "DDSN has not promulgated," is denied for lack of information as to what the subject matter of such regulations would be. The fifth sentence of Paragraph 25 sets forth legal conclusions which can neither be admitted or denied. Insofar as such allegations attempt to establish liability on the part of Defendants, Defendants would deny same and demand strict proof thereof. The sixth and seventh sentences of Paragraph 25 are denied for lack of information about the subject matter of the allegations. In addition, the seventh sentence of Paragraph 22 is denied, insofar as it refers to review by the general public. Defendants also deny that General Assembly review is required for standards governing eligibility and receipt of DDSN services. Any remaining allegations of Paragraph 25 are denied.

27. Paragraph 26 is denied for lack of information. Without knowledge of the identities of the individual Plaintiffs, Defendants can only deny those allegations pertaining to those individuals, their families, and/or others said to be "others like them."

28. The allegations of Paragraph 27 that pertain specifically to Plaintiff A.J. are denied for lack of information. Answering the third and fourth sentences of Paragraph 27, Defendants would refer the Court to the South Carolina Code of Regulations for a precise list of regulations

promulgated by DDSN. To the extent that any subject area mentioned by Plaintiffs in this or any other paragraph of the Complaint is not covered by a DSSN regulation, Defendants would show that there is no legal duty to promulgate regulations in those subject areas. In addition, the fourth sentence of Paragraph 27 is denied. Answering the fifth and last sentence of Paragraph 27, those allegations are denied for lack of information. Without knowledge of the identities of the individual Plaintiffs, Defendants can only deny those allegations pertaining to those individuals, their families, and/or others said to be "others like them." Any remaining allegations of Paragraph 27 are denied.

29. Paragraph 28 is denied for lack of information. Without knowledge of the identities of the individual Plaintiffs, Defendants can only deny those allegations pertaining to those individuals, their families, and/or others said to be "others like them."

30. The allegations of Paragraph 29 that pertain specifically to Plaintiff E.M. (or GM) are denied for lack of information. The Defendants do not know the identities of the individual Plaintiffs. The third sentence of Paragraph 29 is denied, insofar as it refers to review by the general public. In addition, Defendants deny that General Assembly review is required for standards governing eligibility and receipt of DDSN services, or the other matters referenced in that sentence. Answering the fourth and last sentence of Paragraph 29, Defendants would refer the Court to the South Carolina Code of Regulations for a precise list of regulations promulgated by DDSN. To the extent that any subject area mentioned by Plaintiffs in this or any other paragraph of the Complaint is not covered by a DSSN regulation, Defendants would show that there is no legal duty to promulgate regulations in those subject areas. All remaining allegations of Paragraph 29 are denied.

31. Paragraph 30 is denied for lack of information. Without knowledge of the identities of the individual Plaintiffs, Defendants can only deny those allegations pertaining to those individuals, their families, and/or others said to be "others like them."

32. Paragraph 31, except for the next to last sentence thereof, is denied for lack of information. Without knowledge of the identities of the individual Plaintiffs, Defendants can only deny those allegations pertaining to those individuals, their families, and/or others said to be "others like them." With respect to the next to last sentence of Paragraph 31, Defendants would refer the Court to the South Carolina Code of Regulations for a precise list of regulations promulgated by DDSN. To the extent that any subject area mentioned by Plaintiffs in this or any other paragraph of the Complaint is not covered by a DSSN regulation, Defendants would show that there is no legal duty to promulgate regulations in those subject areas.

33. The allegations of Paragraph 32 pertaining specifically to Plaintiff E.J.M. are denied for lack of information. Without knowledge of the identities of the individual Plaintiffs, Defendants can only deny those allegations pertaining to those individuals, their families, and/or others said to be "others like them." With respect to the first part of the second sentence of Paragraph 32, Defendants would refer the Court to the South Carolina Code of Regulations for a precise list of regulations promulgated by DDSN. To the extent that any subject area mentioned by Plaintiffs in this or any other paragraph of the Complaint is not covered by a DSSN regulation, Defendants would show that there is no legal duty to promulgate regulations in those subject areas.

34. Paragraph 33 is denied for lack of information. Without knowledge of the identities of the individual Plaintiffs, Defendants can only deny those allegations pertaining to those individuals, their families, and/or others said to be "others like them."

35. The allegations of Paragraph 34 pertaining to Plaintiff S.P. are denied for lack of information. Without knowledge of the identities of the individual Plaintiffs, Defendants can only deny those allegations pertaining to those individuals, their families, and/or others said to be "others like them." With respect to the third and sixth sentences of Paragraph 34, Defendants would refer the Court to the South Carolina Code of Regulations for a precise list of regulations promulgated by DDSN. To the extent that any subject area mentioned by Plaintiffs in this or any other paragraph of the Complaint is not covered by a DSSN regulation, Defendants would show that there is no legal duty to promulgate regulations in those subject areas.

36. The allegations of Paragraph 35 pertaining to Plaintiff S.S. are denied for lack of information. Without knowledge of the identities of the individual Plaintiffs, Defendants can only deny those allegations pertaining to those individuals, their families, and/or others said to be "others like them." With respect to the fourth sentence of Paragraph 35, which references the DSM-IV or mental conditions described therein, Defendants would refer the Court to that manual for the best evidence of its contents.

37. The allegations of Paragraph 36 pertaining to Plaintiff S.S. are denied for lack of information. Without knowledge of the identities of the individual Plaintiffs, Defendants can only deny those allegations pertaining to those individuals, their families, and/or others said to be "others like them." Answering the fourth sentence of Paragraph 36, that sentence is denied, insofar as it refers to review by the general public. In addition, Defendants deny that General Assembly review is required for standards governing eligibility and receipt of DDSN services, or the other matters referenced in that sentence. Answering the fifth sentence of Paragraph 36, Defendants would refer the Court to the South Carolina Code of Regulations for a precise list of regulations promulgated by DDSN. To the extent that any subject area mentioned by Plaintiffs in

this or any other paragraph of the Complaint is not covered by a DSSN regulation, Defendants would show that there is no legal duty to promulgate regulations in those subject areas. The remaining allegations of Paragraph 36 are denied.

38. Answering Paragraph 37, Defendants reiterate and reallege each and every paragraph and affirmative defense of this Answer as if set forth herein.

39. Answering Paragraph 38, Defendants would refer the Court to the South Carolina Code of Regulations for a precise list of regulations promulgated by DDSN. To the extent that any subject area mentioned by Plaintiffs in this or any other paragraph of the Complaint is not covered by a DSSN regulation, Defendants would show that there is no legal duty to promulgate regulations in those subject areas.

40. Paragraphs 39 through 42 set forth legal conclusions which can neither be admitted or denied. Insofar as such allegations attempt to establish liability on the part of Defendants, Defendants would deny same and demand strict proof thereof.

41. Answering Paragraph 43, it is admitted only that Dr. Stanley Butkus is the duly appointed Director of Defendant SCDDSN. The remainder of Paragraph 43 is denied.

42. Paragraph 44 is admitted.

43. Paragraphs 45 through 48 are denied.

44. Paragraph 49 is merely descriptive of Plaintiffs' beliefs about this action, and as such requires neither admission nor denial. Insofar as such allegations attempt to establish liability on the part of Defendants, Defendants would deny same and demand strict proof thereof.

45. Paragraphs 50 through 53, and the remainder of the Complaint, including the prayer for relief, are denied.

FOR A SECOND DEFENSE

46. The Complaint fails to state facts sufficient to constitute a cause of action.

FOR A THIRD DEFENSE

47. The individual Defendants should be dismissed, because their presence in this action is not necessary to obtain complete relief.

FOR A FOURTH DFENSE

48. On information and belief, some or all Plaintiffs lack standing to bring some or all of the claims set forth in the Complaint.

FOR A FIFTH DEFENSE

49. There is no provision of statute requiring the Defendants, or any of them, to promulgate regulations in the subject areas in which Plaintiffs claim that regulations should be promulgated.

FOR A SIXTH DEFENSE

50. All or part of this action is barred by the doctrine of sovereign immunity.

FOR A SEVENTH DEFENSE

51. On information and belief, some or all Plaintiffs are not real parties in interest to this litigation.

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WHEREFORE, having fully answered the Complaint, Defendants respectfully pray that this action be dismissed with prejudice in its entirety, for the costs of this action, and for such other and further relief as the Court may deem appropriate.

DAVIDSON, MORRISON & LINDEMANN, P.A.

By: /Kenneth P. Woodington

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ATTORNEYS FOR DEFENDANTS

Columbia, South Carolina

December 21, 2007

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND)

Protection and Advocacy for the People with Disabilities, Inc., M.J.B. on behalf of and as next friend of J.B.; C.B.B. on behalf of and as guardian of P.B.; G.C. and L.C. on behalf of and as guardian of F.C.; D.P. on behalf of and as guardian of C.M.D.; K.F. and S.F. on behalf of and as next friend of A.E.; J.H. on behalf of and as next friend of A.J.; G.M. on behalf of and as next friend of E.M.; N.M. on behalf of and as guardian of E.J.M.; R.P. on behalf of and as guardian of S.P.; R.R. and J.R. on behalf of and as guardian of K.D.R.; and J.K. on behalf of and as guardian of S.S.,

Plaintiffs,

v.

South Carolina Department of Disabilities and Special Needs; Dr. Stanley J. Butkus, in his official capacity as Director of the South Carolina Department of Disabilities and Special Needs; and Edythe Dove, Mary Katherine Bagnal, Ronald Forrest, John Vaughn, Dr. Otis Speight, W. Robert Harrell as Commissioners of the South Carolina Department of Disabilities and Special Needs,

Defendants.

Civil Action No. 07-CP-40-2187

CERTIFICATE OF SERVICE

The undersigned employee of Davidson, Morrison & Lindemann, P.A., attorneys for the Defendants , does hereby certify that service of the attached **Answer** in the above-referenced action was made upon all counsel of record by placing same in the United States Mail, first class postage

prepaid, at the below listed address clearly indicated on said envelope this the 21st day of December,

2007, addressed as follows:

Steven W. Hamm, Esquire
C. Jo Anne Wessinger Hill, Esquire
Kenya Carver-Miller, Esquire
Richardson, Plowden & Robinson, P.A.
1900 Barnwell Street
Columbia, South Carolina 29201

Stanley J. Butkus, Ph.D.
State Director
Robert W. Barfield
Deputy State Director Administration
Ronald G. Dozier
Associate State Director Operations
Kathi K. Lacy, Ph.D.
Associate State Director Policy



3440 Harden Street Ext (29203)
PO Box 4706, Columbia, South Carolina 29240
V/TTY: 803/898-9600, FAX: 803/898-9653
Toll Free: 888/DSN-INFO
Home Page: www.state.sc.us/ddsn/

COMMISSION
Bill G. Alexander
Chairman
Lyssa Harvey
Vice Chairman
J. Lewis Stephens
Secretary
Ronald Forrest
W. Robert Harrell
Edythe C. Dove
John C. Vaughn

November 22, 2005

Mr. Steven W. Hamm, Esq.
Richardson, Plowden, Carpenter & Robinson, P.A.
1600 Marion Street
Columbia, SC 29201

RE: Administrative Procedures Act - Regulation Promulgation and Related Issues

Dear Mr. Hamm:

I was contacted by your assistant about meeting with you on October 24, 2005, but the topic for discussion was not conveyed, even upon my request for it. I adjusted my schedule to accommodate a colleague. Although I was again uninformed by your office, you brought Ms. Gloria Prevost, Executive Director, and Ms. Nancy McCormick, Attorney, for South Carolina Protection and Advocacy for People with Disabilities, Inc. to the meeting. You handed me a letter dated October 24, 2005, addressed to Stan Butkus, Ph.D., State Director for SCDDSN and stated that you initially wanted to meet with Dr. Butkus, but were directed to me.

Since I was not told the reason for the meeting, I was not prepared to discuss the issue you raised. As I recall, you stated this was done on purpose. As might be expected the meeting was not productive. Upon review of your letter to Dr. Butkus, it appears that you want SCDDSN to promulgate a series of regulations dealing with eligibility of persons seeking services from SCDDSN, appeals with independent fact finders, Human Rights Committees and standards for placement and transfer of residents in facilities. You also requested that all SCDDSN directives be posted on our website. Further, your letter and discussion intimated that if you did not receive an immediate agreement to do these things that you would seek "more formal means" to achieve your objectives.

As you noted in your letter, DDSN has promulgated regulations. Many agencies have no regulations. Many agencies are like DDSN and have some regulations. DDSN has not needed to promulgate more regulations because the S. C. Code of Laws concerning DDSN state in detail

DISTRICT I
6301 Farrow Road, Columbia, SC 29203
Phone 803/935-7411
Midlands Center - Phone 803
Whitten Center - Phone 864/
DISTRICT II
Coastal
Pee Dee

PLAINTIFF'S EXHIBIT
S.H. 7/9/09

the issues that might otherwise require regulation. S. C. Code Ann. § 1-23-10 even recognizes that there are policy, guidance or procedures which do not require regulation. Another aspect of this issue is that the code of laws concerning DDSN authorizes DDSN to directly contract for services. This enables DDSN to hold its contractors accountable through detailed contract provisions.

The point you made concerning having the policies available to the public is a reasonable suggestion. Availability of these policies has never been a problem. All requests for copies of policies are fulfilled, but this can be one more way to provide this information. DDSN will add its directives to the website by the spring of next year.

Your letter states its purpose "is to express our increasing concern about DDSN's failure to promulgate regulations...". To my knowledge, Ms. Prevost has not contacted Dr. Butkus with any such concern. Mr. Ron Dozier, DDSN Associate State Director-Operations, and Ms. Robin Wheeler of P & A have been meeting regularly to discuss in good faith any issue of concern of either agency. This issue has not been raised. We are unclear where any lack of regulation has threatened the rights and wellbeing of individuals with disabilities.

In order for us to work with P & A to address their concerns, it would be very useful for P & A to provide actual examples where they feel an individual's rights require a regulation for protection or wellbeing. This will help us be clear about your request and is important in our efforts to make services responsive and accountable. We need to know where there may be issues so that we can address them. You stated on October 24 that you would provide me with this information.

DDSN makes every effort to have a professional and cooperative relationship with P & A. Dr. Butkus is aware of your letter and anticipates your provision of the actual case examples for discussion to further resolve any concerns.

Sincerely,

James R. Hill, Jr.
General Counsel

JRH/cch

Encl.

cc: Dr. Stan Butkus, State Director, SCDDSN
Ms. Gloria Prevost, Executive Director, Protection and Advocacy
Board Members, Protection and Advocacy for People with Disabilities, Inc.
Members, SC Commission on Disabilities and Special Needs

Reference Number:	100-01-DD
Title of Document:	Electronic Communications System
Date of Issue:	April 29, 1987
Effective Date:	April 29, 1987
Last Review Date:	April 1, 2009 **REVISED**
Date of Last Revision:	April 1, 2009
Applicability:	Central Office, District Offices, Regional Centers, DSN Boards, Contracted Service Providers, Consumers and Their Families and the General Public

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PURPOSE: The purpose of this directive is to identify the requirement for a computerized communications system to support the management, filing and classification of all official DDSN policies and directives. The SCDDSN Commission Chairman, the State Director, the Deputy Director, the Associate State Directors, or the Director of Internal Audit may originate or declare obsolete these official documents. These documents must be approved by the SCDDSN Commission Chairman, the State Director, or his/ her designee.

The system requires a minimum review process of every three years of such documents, thereby eliminating the circulation of out-of-date documents and the promulgation of accurate and timely documents that are intended to govern actual practice.

TYPES OF DOCUMENTS: There are two types of documents within the Central Office document management system.

1) Commission Policy (CP) - A policy or philosophical statement issued by the SCDDSN Commission and implemented by the agency. These constitute mandates from the agency's governing board.

2) Departmental Directive (DD) - A mandate requiring compliance by applicable Central Office, District Office, Regional Center, DSN Board or Contracted Provider staff. A directive may address policy and/or more specific implementation procedures.

PLAINTIFF'S EXHIBIT 7 SH 7/9/08
PENGAD 800-631-6989

ACCESS: Commission policies and departmental directives are available in "read only" format on the DDSN Website under Directives and Standards. Access to these documents is for anyone.

APPLICABILITY: This Electronic Communication System is applicable to all DDSN Agency Directives and DDSN Commission Policies

QUALITY ASSURANCE: The Division of Quality Management is responsible for the administration of the Electronic Communications System.

Kathi K. Lacy, Ph.D.
Associate State Director
Policy
(Originator)

Eugene A. Laurent, Ph.D.
Interim State Director
(Approved)

Reference Number:	100-02-DD
Title of Document:	Implementation Procedures for the Electronic Communications System Containing Agency Directives and Policies
Date of Issue:	April 29, 1987
Effective Date:	April 29, 1987
Last Review Date:	December 1, 2008
Date of Last Revision:	December 1, 2008
Applicability:	Central Office, District Offices, Regional Centers, DSN Boards and Contracted Providers

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The attached packet contains the procedures to be used by Central Office staff in conjunction with the Electronic Communications System (ECS) for document management. This system was established by Departmental Directive 100-01-DD. These procedures are applicable to all official DDSN Commission Policies and Agency Directives. The Quality Assurance and Quality Improvement Division is responsible for implementation and administration of the system.

Kathi K. Lacy, Ph.D.
Associate State Director
Policy
(Originator)

Stanley J. Butkus, Ph.D.
State Director
(Approved)

The following procedures should be used:

PLAINTIFF'S EXHIBIT 8 S4 - 7/9/09
PENGAD 800-631-6989

SOUTH CAROLINA DEPARTMENT OF DISABILITIES AND SPECIAL NEEDS

Procedure for the Electronic Communications System (ECS) Containing Agency Directives and Policies

Issued: April 29, 1987
Revised: December 1, 2008

SCDDSN ELECTRONIC COMMUNICATIONS SYSTEM

I. INTRODUCTION

These procedures describe the SCDDSN system for issuing Commission Policies and Departmental Directives. One purpose of this process is to classify, file and retrieve important Agency policies and directives.

Another purpose of this process is to enhance communication within and outside of the DDSN system relative to procedures, directives, policies, and guidelines. The process minimizes the issuance of conflicting information to agency staff, service providers, customers and other interested parties.

The source documents are maintained in the ServicesShar Directory on the DDSN Central Office File Server. Access to the source documents are restricted to key personnel in the Quality Assurance and Quality Improvement Division charged with the responsibility for the maintenance of these documents. Commission policies and departmental directives are available in "read only" format on the Policy and Procedures Website of the DDSN Extranet, which is available to all DDSN employees and DDSN business partners (e.g., DSN Boards and contracted providers), and can be reviewed, downloaded, or copied from that location. Commission policies and departmental directives are also available on the DDSN Website.

All applicable entities will receive notification regarding new or revised documents, and will have the ability to access them either from the DDSN Extranet, DDSN website or via e-mail with attachment. In the rare event that an entity affected does not have access to one of the electronic vehicles mentioned above, a hard copy of the document would be made available upon written request.

A hard copy document catalog will be published, upon request, which lists the documents according to subject matter, reference number, title, year of issuance, etc. Additionally an electronic index categorized by subject, key word, reference number, title and date can be accessed on the DDSN Website by clicking on Department Directives.

Each document is reviewed at a minimum every three years and updated per the attached procedures. New documents can be issued at any time during the year, and revisions can be made whenever necessary. However, to avoid duplication of efforts it is recommended that revisions be made during the review process whenever feasible. Revised documents should include a brief cover memorandum summarizing any major changes.

II. DEFINITIONS

Review Process Every Three Years - A process that occurs every 3 years whereby all existing ECS documents are reviewed for relevance, accuracy, and applicability to DDSN's Organized Healthcare Delivery System.

Commission Policy (CP) - A policy or philosophical statement issued by the Commission of the South Carolina Department of Disabilities and Special Needs. These policies are presented to the Director, whose duty it is to implement those policies throughout the agency.

Departmental Directive (DD) - A mandate approved by the State Director or SCDDSN Commission Chairman requiring compliance of applicable Central Office, District Office, Regional Center, DSN Board and Contracted Provider staff.

Document Manager - The person assigned by the Originator to take primary responsibility for the on-going management and updating of a document.

ECS Coordinator - The designated person who is responsible for the assignment of reference numbers; the operation of the every three year review process; coordination of the posting of new/ revised documents onto the Extranet and DDSN website; and the updating of the hard copy file, under the direction of the Quality Assurance and Quality Improvement Division Director.

Master File - The ECS Coordinator maintains a hard copy "Reading File" where all original signature documents are located. Duplicate hard copies may be obtained from the master file.

Obsolete – A document determined by the Originator or Document Manager to be useless or no longer in effect. Signatures by the Originator and Authorized "Approved" employee must be completed prior to making a directive obsolete.

Originator - The person under whose direction the document was initiated and whose scope of supervision is related to the activities addressed in the document. This is a senior level manager (a Deputy State Director, Associate State Director, Director of Human Resource Management, or Director of Internal Audit). The Originator's signature is always found on the document.

Reference Number - A unique number assigned to a particular document reflecting the general subject matter category, the chronological order of issue within that subject category, and the type of document.

III. CODE NUMBER SERIES FOR SUBJECT CATEGORIES

100 - General Administrative/ Community Education/Legal

200 - Finance and Accounting/Community Contracts/Internal Audit

300 – Engineering/Services and Supplies/IRM

400 – Human Resource Management

500 - SCDDSN Services (entry through discharge) CDSS/STS Advocacy/ Training

600 – Regional Facility Services/Programs

700 – Home and Community Services/Programs

The above categories are arranged by subject matter, not by current organizational structure. Organizational changes within the agency should not affect the document management system, per the above categories. Additional categories may be added as necessary.

A. STEPS FOR ASSIGNING REFERENCE NUMBERS (New Departmental Directives)

These steps will be followed by the ECS Coordinator in assigning a reference number to a document:

1) When a request has been received for a new document number, the ECS Coordinator, in conjunction with the originator or Document Manager and as authorized by the Associate State Director of Policy will determine which of the above categories the new document falls within (refer to the preceding section entitled "Code Number Series for Subject Categories"). When the subject of the document applies to several categories, the most appropriate category will be used. When the subject applies to many categories or no specific category, the "100" series will be used.

2) The ECS Coordinator will, at the same time, obtain from the Originator or Document Manager the type or classification of the new document (refer to the Definitions Section above).

3) When the directive has been reviewed by all appropriate internal DDSN staff, has been circulated for comment on the extranet and DDSN website for a minimum of 30 calendar days, and is ready for signatures, the ECS Coordinator will then assign the new document the next available sequential number and record that number as issued. There should never be a gap in the sequence of numbers. (NOTE: In order to avoid gaps, any index of documents published will still carry the numbers assigned to now obsolete documents with the notation "Obsolete" after the number.)

4) Documents that have become obsolete will retain their original reference number, but will have a "Last Review Date" that reflects the date it was reviewed, and the word "Obsolete" inserted beside that date.

5) Documents that have been declared "Obsolete" will be removed from the Agency's restricted access ServicesShar directory and from the Policy and Procedure Website on the Extranet by the ECS Coordinator and from the DSN website by the DDSN Webmaster and placed in the "historical" section of the database.

6) Documents may be cross-referenced with other documents of similar or related content. Such cross-references shall be determined by the Document Manager and placed at the very bottom of the last page of a given document.

B. EXPLANATION OF REFERENCE NUMBERS

Example: **100-01-DD**

The first group of numbers in the example above (100) indicates the general category of subject matter addressed in the document. (The "100" in the example at the top of the page indicates that the document concerns General Administration/Community Education/Legal issues).

The second group of numbers in the example above (01) indicates the sequential order in which that document was assigned a number within that subject area. (In the above example, the "01" indicates that this is the first such document within the category of General Administration/Community Education/Legal issues).

The final alpha characters in the example above (DD) indicate the type of document being issued (i.e., Commission Policy (CP), Departmental Directive (DD). In the above example, the "DD" indicates that the document is a Departmental Directive.)

IV. STEPS FOR HAVING A NEW DOCUMENT APPROVED

A. The Originator or Document Manager will solicit feedback on the draft document from appropriate internal reviewers first. Then, the Originator or Document Manager will forward the document with any major changes highlighted or summarized to the DDSN reviewers, DDSN Distribution List, Contracted Providers and DSN Boards, and from the general public via the website allowing sufficient time for feedback to be submitted and incorporated. A minimum of 30 calendar days will be the default. Note: It is the Department's intent to solicit feedback/input from all entities affected by the document.

B. The Originator or Document Manager will make sure the final document is then typed in the proper format and will obtain the reference number from the ECS Coordinator to incorporate into the document. The Originator or Document Manager will write a brief memo explaining the purpose of the new document. (See section titled "The Correct Format").

C. The Originator will sign the document and secure the required signature of the Agency Director unless the Agency Director was the originator.

D. The Originator or Document Manager will deliver the signed original to the ECS Coordinator with a listing of parties (master list available from ECS Coordinator) to be notified of the new document. If there are entities designated who do not have access to the Internet or e-mail, the Originator or Document Manager will arrange to have a hard copy mailed to those entities upon written request.

E. The ECS Coordinator will add the new document to the Agency's restricted access ServicesShar directory and to the Policy and Procedure Website on the Agency's Extranet for DDSN employees and business partners, and on the DDSN Website for all interested parties. He/she will electronically notify all parties on the list provided of the new document and where the document can be found.

F. The ECS Coordinator will then place the signed original hard copy of the document obtained from the Originator or Document Manager in the Master File.

V. STEPS FOR THE ANNUAL REVIEW OF DOCUMENTS

A. The Director of Quality Assurance and Quality Improvement will establish review dates every three years for all existing documents.

B. Approximately one month prior to the review date, the ECS Coordinator will e-mail a copy of the document to the Document Manager to notify them of the upcoming review

The Document Manager will review the document, distribute for input as needed and notify the ECS Coordinator which of the following applies: a) document will retain the same content; b) document requires revision; or, c) document is to be declared obsolete.

Note: It is the Department's intent to solicit feedback/input from all entities affected by the document.

1. **If the document is to retain the same content,** the Document Manager will update and forward one copy of the first page of the directive to the ECS Coordinator with changes to the "Last Review Date" and add "No Changes". The Document Manager will write a brief memo stating no changes were made. The Originator must concur with this decision and sign off on the document manager's memo. The ECS Coordinator will then repost the document on the Agency's restricted access ServicesShar directory, the Policy and Procedure Website on the Extranet and request the DDSN Webmaster to post on the DDSN website. No notice will be distributed but the new first page will replace the old one on the original signed document in the Master File.

2. **If the document requires revision,** the Document Manager will solicit feedback/input from appropriate reviewers allowing sufficient time for feedback to be submitted and incorporated, normally 30 calendar days. The Document Manager will write a brief memo outlining the major changes. The Originator will sign the document and secure the required signature of the Agency Director unless the Agency Director was the originator. The Document Manager will then provide the ECS Coordinator with the newly signed revised hard copy, which will be placed in the Master File, replacing the previous copy. The Document Manager will also provide the ECS Coordinator with an electronic copy of the revised document. The ECS coordinator will archive the former document in the historical section of the database (using the appropriate alpha character e.g., 100-09 DD (a), 100-09 (b), as needed), post the revised document and distribute a notification to all affected entities (distribution to be determined by the Document Manager) with the cover memo from the Document Manager explaining the revisions.

3. **If the document is to be declared obsolete,** the Document Manager will update and forward one copy of the first page of the

directive to the ECS Coordinator with changes to the "Last 100-02-DD Review Date" and add "Obsolete". The Document Manager will write a brief memo stating the directive is obsolete. The Originator must concur with this decision and sign off on the Document Manager's memo. The Document Manager will inform the ECS coordinator who will then remove the document from the Agency's restricted access ServicesShar directory and the Policy and Procedure Website on the Extranet and request to the DDSN Webmaster that the Directive be removed from the DDSN Website and distribute notification that the document is considered obsolete and no longer in effect (distribution to be determined by the Document Manager).

The listing of the document in the Catalog, however, will continue with a notation of "Obsolete" added.

VI. THE CORRECT FORMAT

All documents issued by SCDDSN will use the below formatting.

- Use tabs or wrap text for alignment.
- Draw lines with tab key.
- Style – use Body Text.
- Block paragraph style.
- Bold headings with Roman Numerals.
- Bold "Revised" or "Obsolete", if applicable, in the heading of the directive.

Letterhead at top (letterhead margin 3.2)

Reference Number: (Font: Times New Roman)
Title of Document: (12 pt.)

Date of Issue: (margin for bottom and sides—1 inch)
Effective Date:
Last Review Date:
Date of Last Revision:

Applicability:

The body of the document will follow. There may be one or two signatures at the end depending on the Originator. Commission Policies will be signed by the Chairman of the S.C. Disabilities and Special Needs Commission and any other member warranted.

Departmental Directives that originate from the State Director will be signed by the Director. (This document will have only one signature.)

Departmental Directives that originate from a Deputy Director, an Associate State Director, the Director of Human Resources or the Director of Internal Audit will have their signature on the "Originator" line. All of these shall also have the State Director's signature on the "Approved" line.

If a document has more than one page, the subsequent pages should contain: the Reference Number, the Date of Issue (or Date of Last Revision for revised documents) and the page number at the top left of all pages.

_____ _____

(Originator)(left side of page) (Approved)(right side of page)

Cross references: (optional)

A. EXPLANATION OF THE FORMAT

Reference Number: – The number that designates the subject matter, the chronological sequence of the document, and the type of document. (i.e., 100-01-DD)

Title of Document: – The name given to the document that describes the contents. (i.e. Smoking in the Work place)

Date of Issue: – The date on which the document was made available or issued. (i.e., June 1, 2001)

Effective Date: – The date in which the original document's instructions were to be implemented. Frequently a document will be issued in advance of the implementation date. At other times, the Date of Issue will be the same at the Effective Date, which never changes even though the contents may be revised.

Last Review Date: – The date on which the document was reviewed for revision by the appropriate source. Newly issued documents will use the "Date of Issue" as the "Last Review Date." Annually thereafter, the last review date will be the date the document was reviewed for relevancy. (If a document is revised, make sure the Last Review Date and the Date of Last Revision are the same.) When a document becomes useless, enter the word "Obsolete" after the Last Review Date. (Remember that obsolete documents must be approved in advance. See pages 4 and 5).

Date of Last Revision: – The date on which the "contents" of the directive were changed. If no changes were made in the content during the annual review, "Date

of Last Revision" will remain unchanged. Type "No Revision" beside "Last Review Date".

Applicability: – The name of the agencies, services and/or programs to which the policy applies.

Originator: – The person under whose direction the document was initiated and whose scope of supervision is related to the activities addressed in the document. This is a senior level manager (the Deputy). The Originator's signature is always found on the document. (Commission policies will only have an approved signature, which also serves as the Originator's signature.)

Approved: – The Agency Director's signature must be present in this space if he/she originated the document. His/her signature must appear as the approval source for documents originating from the Deputy Director, Associate State Directors, or the Director of Internal Audit. Commission policies must be signed by the SCDDSN Commission Chairman on the "Approved" line and the Vice-Chairman or his/her designee.

Cross Reference Number: – The reference number of existing directives which are relevant in content may be listed at the very end of a new or revised directive allowing the reader to identify and access other policies and procedures with related subject matter. Completion of this portion is optional.

Obsolete: – A document determined by the Originator or Document Manager to be useless or no longer in effect.

ALL OF THESE ITEMS MUST BE COMPLETED, IF APPLICABLE, PRIOR TO THE OFFICIAL POSTING OF THE DOCUMENT ON THE SERVICESSHAR DIRECTORY, THE DDSN EXTRANET, AND ON THE DDSN WEBSITE, UNDER DEPARTMENT DIRECTIVES.

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND)

Protection and Advocacy for People with Disabilities, Inc, MJB on behalf of and as next friend of J.B., CBB on behalf of and as guardian of P.B., GC and LC on behalf of and as guardian of F.C., DP on behalf of and as guardian of C.M.D., KF and SF on behalf of and as next friend of A.F., JH on behalf of and as next friend of A.J., GM on behalf of and as next friend of E.M., MM on behalf of and as guardian of E.J.M., RP on behalf of and as guardian of S.P., RR and JR on behalf of and as guardian of K.D.R., and JK on behalf of and as guardian of S.S.

Plaintiff(s)

vs.

South Carolina Department of Disabilities and Special Needs, Dr. Stanley J. Butkus, in his official capacity as Director of the South Carolina Department of Disabilities and Special Needs, and Edythe Dove, Mary Katherine Bagnal, Ronald Forrest, John Vaughn, Dr. Otis Speight, W. Robert Harrell as Commissioners of the South Carolina Department of Disabilities and Special Needs.

Defendant(s)

CIVIL ACTION COVER SHEET

2007CP4002187

RICHLAND COUNTY FILED
2007 APR -5 PM 4:36
BARBARA A. SCOTT C.O.C. & G.S.

(Please Print)
Submitted By: Kenya Carver Miller
Address: 1900 Barnwell Street, Columbia, SC 29201
PO Drawer 7788, Columbia, SC 29202

SC Bar #: 72634
Telephone #: 803-771-4400
Fax #: 803-779-0016
Other:
E-mail: kmiller@rpcrlaw.com

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (*Check all that apply*)

If Action is Judgment/Settlement do not complete

- ☐ **JURY TRIAL** demanded in complaint. ☒ **NON-JURY TRIAL** demanded in complaint.
- ☐ This case is subject to **ARBITRATION** pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- ☐ This case is subject to **MEDIATION** pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- ☐ This case is exempt from ADR (certificate attached).

NATURE OF ACTION (*Check One Box Below*)

Contracts
- ☐ Constructions (100)
- ☐ Debt Collection (110)
- ☐ Employment (120)
- ☐ General (130)
- ☐ Breach of Contract (140)
- ☐ Other (199)

Torts - Professional Malpractice
- ☐ Dental Malpractice (200)
- ☐ Legal Malpractice (210)
- ☐ Medical Malpractice (220)
- ☐ Notice/ File Med Mal (230)
- ☐ Other (299)

Torts – Personal Injury
- ☐ Assault/Slander/Libel (300)
- ☐ Conversion (310)
- ☐ Motor Vehicle Accident (320)
- ☐ Premises Liability (330)
- ☐ Products Liability (340)
- ☐ Personal Injury (350)
- ☐ Wrongful Death (360)
- ☐ Other (399)

Real Property
- ☐ Claim & Delivery (400)
- ☐ Condemnation (410)
- ☐ Foreclosure (420)
- ☐ Mechanic's Lien (430)
- ☐ Partition (440)
- ☐ Possession (450)
- ☐ Building Code Violation (460)
- ☐ Other (499)

PLAINTIFF'S EXHIBIT 9 S4 7/9/0

Inmate Petitions

- ☐ PCR (500)
- ☐ Sexual Predator (510)
- ☐ Mandamus (520)
- ☐ Habeas Corpus (530)
- ☐ Other (599)

Judgments/Settlements

- ☐ Death Settlement (700)
- ☐ Foreign Judgment (710)
- ☐ Magistrate's Judgment (720)
- ☐ Minor Settlement (730)
- ☐ Transcript Judgment (740)
- ☐ Lis Pendens (750)
- ☐ Other (799)

Administrative Law/Relief

- ☐ Reinstate Driver's License (800)
- ☐ Judicial Review (810)
- ☐ Relief (820)
- ☐ Permanent Injunction (830)
- ☐ Forfeiture (840)
- ☒ Other (899)

Declaratory Judgment Action

Appeals

- ☐ Arbitration (900)
- ☐ Magistrate-Civil (910)
- ☐ Magistrate-Criminal (920)
- ☐ Municipal (930)
- ☐ Probate Court (940)
- ☐ SCDOT (950)
- ☐ Worker's Comp (960)
- ☐ Zoning Board (970)
- ☐ Administrative Law Judge (980)
- ☐ Public Service Commission (990)
- ☐ Employment Security Comm (991)
- ☐ Other (999)

Special/Complex /Other

- ☐ Environmental (600)
- ☐ Automobile Arb. (610)
- ☐ Medical (620)
- ☐ Other (699)

Negligence: Damages to Under Ground Utilities

- ☐ Pharmaceuticals (630)
- ☐ Unfair Trade Practices (640)
- ☐ Out-of State Depositions (650)

Submitting Party Signature: _____ **Date:** April 5, 2007

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND Protection and Advocacy for People with Disabilities, Inc, MJB on behalf of and as next friend of J.B., CBB on behalf of and as guardian of P.B., GC and LC on behalf of and as guardian of F.C., DP on behalf of and as guardian of C.M.D., KF and SF on behalf of and as next friend of A.F., JH on behalf of and as next friend of A.J., GM on behalf of and as next friend of E.M., MM on behalf of and as guardian of E.J.M., RP on behalf of and as guardian of S.P., RR and JR on behalf of and as guardian of K.D.R., and JK on behalf of and as guardian of S.S. PLAINTIFFS, v. South Carolina Department of Disabilities and Special Needs, Dr. Stanley J. Butkus, in his official capacity as Director of the South Carolina Department of Disabilities and Special Needs, and Edythe Dove, Mary Katherine Bagnal, Ronald Forrest, John Vaughn, Dr. Otis Speight, W. Robert Harrell as Commissioners of the South Carolina Department of Disabilities and Special Needs. DEFENDANTS.	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT CIVIL ACTION NO.: **SUMMONS** **(Non-Jury)**

RICHLAND COUNTY
FILED
2007 APR -5 PM 4:40
BARBARA A. SCOTT
C.C.P. & G.S.

TO THE ABOVE NAMED DEFENDANTS:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to the Complaint on the Plaintiff at 1900 Barnwell Street, Columbia, South Carolina 29201, within thirty (30) days after the service hereof, exclusive of the day of such

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	
	CIVIL ACTION NO.:
Protection and Advocacy for People with Disabilities, Inc, MJB on behalf of and as next friend of J.B., CBB on behalf of and as guardian of P.B., GC and LC on behalf of and as guardian of F.C., DP on behalf of and as guardian of C.M.D., KF and SF on behalf of and as next friend of A.F., JH on behalf of and as next friend of A.J., GM on behalf of and as next friend of E.M., MM on behalf of and as guardian of E.J.M., RP on behalf of and as guardian of S.P., RR and JR on behalf of and as guardian of K.D.R., and JK on behalf of and as guardian of S.S.	**SUMMONS (Non-Jury)**
PLAINTIFFS,	
v.	
South Carolina Department of Disabilities and Special Needs, Dr. Stanley J. Butkus, in his official capacity as Director of the South Carolina Department of Disabilities and Special Needs, and Edythe Dove, Mary Katherine Bagnal, Ronald Forrest, John Vaughn, Dr. Otis Speight, W. Robert Harrell as Commissioners of the South Carolina Department of Disabilities and Special Needs.	
DEFENDANTS.	

RICHLAND COUNTY
FILED
2007 APR -5 PM 4:40
BARBARA A. SCOTT
C.C. & G.S.

TO THE ABOVE NAMED DEFENDANTS:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to the Complaint on the Plaintiff at 1900 Barnwell Street, Columbia, South Carolina 29201, within thirty (30) days after the service hereof, exclusive of the day of such

service, and if you fail to answer the Complaint within the time aforesaid, Plaintiff will apply to the Court for the relief demanded in the Complaint.

RICHARDSON, PLOWDEN,
CARPENTER & ROBINSON, PA

BY: _____

Steven W. Hamm
C. Jo Anne Wessinger Hill
Kenya Carver-Miller
1900 Barnwell Street
Columbia, South Carolina 29201
803-771-4400

ATTORNEYS FOR PLAINTIFFS

Columbia, South Carolina

April 5, 2007

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	CIVIL ACTION NO.:
	)	
Protection and Advocacy for People with Disabilities, Inc, MJB on behalf of and as next friend of J.B., CBB on behalf of and as guardian of P.B., GC and LC on behalf of and as guardian of F.C., DP on behalf of and as guardian of C.M.D., KF and SF on behalf of and as next friend of A.F., JH on behalf of and as next friend of A.J., GM on behalf of and as next friend of E.M., MM on behalf of and as guardian of E.J.M., RP on behalf of and as guardian of S.P., RR and JR on behalf of and as guardian of K.D.R., and JK on behalf of and as guardian of S.S.	)	**COMPLAINT** **(Non-Jury)**
PLAINTIFFS,	)	
v.	)	
South Carolina Department of Disabilities and Special Needs, Dr. Stanley J. Butkus, in his official capacity as Director of the South Carolina Department of Disabilities and Special Needs, and Edythe Dove, Mary Katherine Bagnal, Ronald Forrest, John Vaughn, Dr. Otis Speight, W. Robert Harrell as Commissioners of the South Carolina Department of Disabilities and Special Needs.	)	
DEFENDANTS.	)	

RICHLAND COUNTY
FILED
2007 APR -5 PM 4:40
BARBARA A. SCOTT
C.C.C. & G.S.

Plaintiffs would respectfully show unto the Court:

PARTIES AND JURISDICTION

1. That Plaintiff Protection and Advocacy for People with Disabilities, Inc. (hereinafter "P&A") is a private, non-profit corporation established pursuant to Federal and State law to protect and advocate for the rights of people with disabilities in the State of South

Carolina, including individuals eligible for or receiving services from SCDDSN. P&A represents individuals and their families who receive some services from or seek appropriate services from SCDDSN.

2. That individual Plaintiffs are citizens and residents of the State of South Carolina who have need for services from Defendant South Carolina Department of Disabilities and Special Needs (hereinafter "SCDDSN"). Due to the highly personal nature of the facts surrounding their claims and due to their fear of retaliation by Defendant, Plaintiffs will be identified in this Complaint by their initials only. Additionally, any reference to his or her, herein, is not an indication of any particular gender.

3. That Defendant SCDDSN is a state agency created by and operating through the authority of the South Carolina General Assembly, pursuant to S. C. Code Ann. §§ 44-20-10 *et seq.* with the stated purpose of "[having] authority over all of the state's services and programs for the treatment and training of persons with mental retardation, related disabilities, head injuries, and spinal cord injuries." S.C. Code Ann. § 44-20-240.

4. That Defendant Dr. Stanley Butkus is the duly appointed Director of defendant SCDDSN, and in such capacity has virtually unfettered and nonreviewable authority over decisions affecting thousands of citizens of this State.

5. The Defendants Edythe Dove, Mary Katherine Bagnal, Ronald Forrest, John Vaughn, Dr. Otis Speight, W. Robert Harrell as Commissioners of the South Carolina Department of Disabilities and Special Needs, are charged with the statutory duty to determine the policy and promulgate regulations governing the operation of the department [SCDDSN] and the employment of professional staff and personnel.

6. That pursuant to the South Carolina Administrative Procedures Act (APA), S.C. Code Ann. 1-23-10 *et seq.* and SCDDSN's enabling statute (S.C. Code Ann. 44-20-10 *et seq.*) SCDDSN is statutorily required to promulgate regulations. Additionally, the APA was intended to provide a standardized process for all public agencies to formulate rules in order to obtain public comment and to provide access to agencies' operations as well as an avenue for appellate review of administrative decisions.

7. That SCDDSN has never promulgated regulations regarding issues of critical concern to applicants and recipients of its services, including but not limited to eligibility for its services; appeal procedures; standards for the operation of its residential programs; procedures for its Human Rights Committees; and standards for research on human subjects.

8. That SCDDSN's failure to comply with the requirements of the APA has resulted in South Carolina citizens and entities being unable to seek information about its policies in the South Carolina Administrative Code, unable to determine their rights to receive or dispute SCDDSN decisions, and participate in the rule-making process as intended by the APA.

9. That the individual Plaintiffs have been, are being and will continue to be harmed as the direct result of said deficiencies, through denial of services, inadequate services and unequal availability and quality of services, and lack of an appropriate grievance procedure; all of which affect their health, safety, well-being, their right to live and participate in their communities and their ability to enjoy typical lifestyles.

10. That Plaintiff P&A has been, and will continue to be, injured by Defendant's failure to promulgate regulations in that it has and will continue to repeatedly expend time and resources attempting to determine and enforce rights of developmentally disabled persons

without access to any meaningful or enforceable rules or regulations regarding eligibility and services, and with no access to judicial review of decisions affecting its clients.

11. That this Court has jurisdiction to declare, rights, status, and other legal relations and to grant injunctive and other relief pursuant to the South Carolina Uniform Declaratory Judgment Act, S.C. Code Ann. §§ 15-53-10, *et seq.*, by ordering Defendant to promulgate regulations concerning its operation and services, as more fully set forth in this complaint.

BACKGROUND FACTS

12. The allegations of all preceding paragraphs are incorporated as if repeated verbatim herein.

13. Plaintiff P&A has been, and will continue to be, injured by SCDDSN's failure to promulgate regulations in that it has and will continue to repeatedly expend time and resources attempting to determine and enforce rights of developmentally disabled persons without access to any meaningful or enforceable rules or regulations regarding eligibility and services, and with no access to judicial review of decisions affecting its clients.

14. J.B. is a resident of a facility for people with developmental disabilities and has been a SCDDSN client for many years. His disabilities include a tendency towards self-destructive and aggressive behaviors. The facility, defined as a Community Training Home II ("CTH II") by SCDDSN, included in his care plan that he would be provided with services of a psychologist to develop a "Behavior Support Plan (BSP)". BSPs are designed to provide the resident staff with specific target behavior identification along with effective prevention and interventions tailored to the needs of the individual client. They are an integral part of effective services and are required to enhance the individual's skills in order to increase independence and minimize self-injury and injuries to other clients and staff. However, for over a year while J.B.

lived in the supervised facility, SCDDSN failed to develop a BSP, despite repeated efforts by P&A and J.B.'s family.

15. BSPs are critically important to the recipients of services and to the service providers. However, SCDDSN has never promulgated regulations regarding their process or components nor has SCDDSN promulgated regulations for the operation of these CTH II homes. Instead, SCDDSN implements internal directives to serve as a guide in implementing BSPs. Pursuant to SCDDSN internal directives, BSPs must be approved by a Human Rights Committee (HRC). See S.C. Code of Laws § 44-26-70 (mandating the establishment of Human Rights Committees). The role of the HRCs is to safeguard and protect the rights of people receiving services and to ensure that individuals are treated with dignity and respect in the full recognition of their rights. However, HRCs do not have the authority to order that a BSP be developed within a certain time frame as SCDDSN has not promulgated any regulations regarding the membership, jurisdiction, or procedures of HRCs.

16. During the time that J.B. went without any BSP in place, J.B. suffered increased aggressiveness and self-destructive behavior. Not only did he pose a danger of harm to himself, but staff and other clients were at increased risk as well. Although J.B.'s family and P&A worked for over a year to get a BSP for J.B, their efforts were met with limited success as no regulation exists to provide a method to appeal the failure to develop or implement a BSP. J. B., and others like him, are and will continue to be subjected to this type of arbitrary failure and refusal to provide a proper level of services unless and until SCDDSN is forced to promulgate and adhere to regulations, with the availability of judicial review.

17. P.B. is a person who has mental retardation residing in a supervised apartment ("SLP II") funded by SCDDSN. Without prior notice to P.B.'s guardian or other persons

receiving similar services across the state, SCDDSN implemented a change in policy purportedly eliminating P.B.'s eligibility to receive the adult companion services which SCDDSN had provided for many years prior to this change of policy. In addition, without notice to guardians or family members, SCDDSN changed the standards for supervision of the program, so that 24 hours a day on-site supervision is not provided to P.B. and other persons living in SLP II settings as was required when P.B. was admitted to the program. P.B. was subsequently left unsupervised at a public fair. P.B.'s guardian reported this neglect to the South Carolina Department of Social Services after the SCDDSN private/contract provider refused to do so. SCDDSN has not promulgated any regulations with regard to operation of SLPs. Regulations are needed to establish standards for supervision, reporting procedures, an appeals process to challenge decisions of the SCDDSN and procedures for the operation of an independent HRC.

18. SCDDSN's failure to promulgate regulations has resulted in P.B. incurring significant legal expenses to protect his services. Promulgation of regulations by Defendant would provide P.B., his family and others like him with meaningful participation into the rulemaking process, access to information about the agency's rules and eligibility requirements as well as standards for particular services, and ensure that services are provided uniformly and fairly throughout the state.

19. F.C. is a minor child who lives with his parents. F.C. has a long history of hospitalizations and treatment, as his parents have tried desperately to find the right kind of help for him. Experts have concluded that F.C. has Asperger's Disorder, as well as Attention Deficit Hyperactivity Disorder (ADHD) and other diagnoses. Asperger's Disorder is a developmental disability (not a mental illness), classified in the Diagnostic and Statistical Manual (DSM-IV) under "Pervasive Developmental Disorders". It is characterized by symptoms such as

impairment in the use of nonverbal behaviors to regulate social interaction, apparently inflexible adherence to specific, nonfunctional routines or rituals, and severe and sustained impairment in social interaction. Likewise, F.C., who has severe developmental delays including emotional and social deficits, is unable to socialize effectively, has difficultly understanding nonverbal social and other cues, is unable to function effectively in many school and home situations, and requires specialized training and habilitation.

20. F.C.'s mother contacted SCDDSN and attempted to have F.C. evaluated for services. However, SCDDSN refused to evaluate F.C. stating that SCDDSN does not recognize the diagnosis of Asperger's as criteria for eligibility for services. SCDDSN denied services to F.C. despite the fact that Asperger's is very similar to Autism, a condition that SCDDSN does serve, and despite that South Carolina statutory law requires that Defendant SCDDSN treat individuals with mental retardation and "related disabilities". See S.C. Code Ann. § 44-20-240.

21. The Department of Mental Health and the Continuum of Care for Emotionally Disturbed Children have provided some services to assist F.C., but due to their lack of expertise in the treatment of developmental disorders such as Autism and Asperger's, these services have not and cannot adequately address the needs of F.C. As a result, F.C. remains in danger of institutionalization due to a lack of appropriate long-term services, which could and should be provided by SCDDSN as the agency charged by law with serving people of all ages who have developmental disorders.

22. Neither the standards for eligibility and receipt of SCDDSN services nor the grievance process have been subjected to review by the public or the General Assembly. SCDDSN has no regulation or clearly established procedures for appealing the denial of services to an internal or external hearing officer. Consequently, F.C. and his family have no meaningful

access to standards used to determine to which services he may be entitled. F.C. and his family have no avenue for appealing any SCDDSN determination regarding services provided, or not, by SCDDSN. Promulgation of regulations by Defendant would provide F.C., his family and others like him with meaningful participation into the rulemaking process, access to information about the agency's rules and eligibility requirements as well as standards for particular services, and ensure that services are provided uniformly and fairly throughout the state. Promulgation of regulations would also provide individuals such as F.C. and his family with a process for accessing the courts to obtain a decision by a neutral third party where SCDDSN's actions fail to conform to the regulation.

23. C.M.D. is an adult residing in a group home funded by SCDDSN which is classified as a CTH II home. Funds for the purchase of this residence were provided by SCDDSN and the South Carolina Housing Trust Fund. C.M.D. disputes the method used to calculate her rental payment to the CTH II home. SCDDSN has failed to promulgate regulations for the establishment of rent charged to residents of SCDDSN CTH II funded residences. In addition, SCDDSN has failed to promulgate regulations for the release of records and investigations to victims of abuse, neglect and exploitation and has denied C.M.D.'s brother and guardian access to records regarding abuse and neglect of C.M.D. Promulgation of regulations by Defendant would provide C.M.D., his family and others like him with meaningful participation into the rulemaking process, access to information about the agency's rules and eligibility requirements as well as standards for particular services, and ensure that services are provided uniformly and fairly throughout the state. Promulgation of regulations would also provide individuals such as C.M.D. and his family with a process for accessing the courts to

obtain a decision by a neutral third party where SCDDSN's actions fail to conform to the regulation.

24. Plaintiff A.F., age 19, lives with his parents and natural guardians, K.F. and S.F. A.F. has been diagnosed with and treated for many years for severe developmental disabilities, including Asperger's Syndrome and Pervasive Developmental Disorder. As the result of his developmental disorders, he has extreme difficulty with social interaction and adaptation, with independent living skills, and with learning. He has become increasingly aggressive and difficult for his parents to handle, to the point that it has become clear that, without appropriate support services, his parents will be forced to place him in a residential care facility. Despite A.F.'s critical and obvious need for services, Defendant SCDDSN steadfastly refused to provide services or participate in meetings with other service providers, including the local school district, local Department of Mental Health Center, and local Department of Juvenile Justice personnel.

25. Eventually, the Family Court in a juvenile justice proceeding ordered SCDDSN to provide services to A.F., who will need services for the rest of his life. However, once A.F. reached the age of eighteen, SCDDSN was no longer obligated under the Court Order to provide him with services. Recently, SCDDSN terminated A.F. from services. SCDDSN has not promulgated any regulations for A.F.'s family to refer to or for SCDDSN employees to follow, in making the decision to continue or discontinue services, or in determining what services A.F. would receive if any. There is also no avenue for appealing any SCDDSN determination with regard to denied services. Although SCDDSN has a "grievance process", this loosely defined process is subject to change at any time without notice. Neither the standards for eligibility and

receipt of services nor the grievance process have been subjected to review by the public or the General Assembly.

26. Promulgation of regulations by Defendant would provide A.F., his family and others like him with meaningful participation into the rulemaking process, access to information about the agency's rules and eligibility requirements as well as standards for particular services, and ensure that services are provided uniformly and fairly throughout the state. Promulgation would also provide individuals such as A.F. and his family with a process for accessing the courts to obtain a decision by a neutral third party where SCDDSN's actions fail to conform to the regulations.

27. A.J. is a person who has mental retardation and resides in an SLP II. SCDDSN has paid for his participation in a workshop program; however, A.J. has been assaulted twice at the workshop and is fearful of returning to the workshop. SCDDSN has denied A.J. and other residents of SLP II's eligibility for less expensive adult companion services by changing the eligibility criteria to require A.J. and others like him to attend institutional day programs. SCDDSN has not promulgated any regulations with regard to the standards for eligibility and receipt of services. SCDDSN has no regulation or clearly established procedures for appealing the denial of services to an internal or external hearing officer. Promulgation of regulations by Defendant would provide A.J., his family and others like him with meaningful participation into the rulemaking process, access to information about the agency's rules and eligibility requirements as well as standards for particular services, and ensure that services are provided uniformly and fairly throughout the state.

28. E.M. is a long-time client of Defendant SCDDSN. Over the years, E.M. has utilized day services obtained through the use of Medicaid funds administered by Defendant

SCDDSN. E.M. has participated in a job training program and is employable in the private sector, albeit in very limited areas. E.M.'s parents have always cared for him in the home, and though E.M. is well into adulthood, he is unable, and is unlikely to ever be able, to live on his own. Although E.M. and his parents are aware that there is a long waiting list for residential services through Defendant SCDDSN, they have, for many years, attempted to have E. M. placed on a waiting list. Despite the declining health of E.M.'s parents, Defendant SCDDSN for years refused to place E.M. on a waiting list for residential placement. In effect, Defendant SCDDSN informed E.M. and his family that unless E.M.'s needs were "critical" (i.e. he was facing immediate homelessness) or it he could be shown that he needed residential placement within twelve months, he could not be placed on any list. E.M.'s parents even offered to pay for the difference between E.M.'s current funding and the cost of a residential placement. SCDDSN, however, refused to allow such use of the funds, and failed to provide any explanation for such refusal or appeal options.

29. After years of requesting that E.M. be placed on the waiting list, just recently in late 2006, SCDDSN finally provided GM with a verbal offer of residential placement. Nevertheless, due to SCDDSN's failure to promulgate regulations as it is required to do so, E.M. and his family was not afforded access to any formal procedure for challenging Defendant's waiting list procedures or their decisions regarding the use of funds in which Plaintiff E.M. had already been approved. Neither the standards for eligibility and receipt of services, the standards governing choice of services needed/provided, the waiting list process, nor the grievance process are subjected to review by the public or the General Assembly. SCDDSN has no regulation or clearly established procedures for appealing the denial of services, denial of change in services, or admission to or priority on a waiting list to an internal or external hearing officer.

30. E.M. and his family were afforded no avenue for appealing any SCDDSN determination regarding services provided, or not, by SCDDSN as no such procedure exists. Promulgation of regulations by Defendant would have provided E.M., his family and others like him with meaningful participation into the rulemaking process, access to information about the agency's rules and eligibility requirements as well as standards for particular services, and ensure that services are provided uniformly and fairly throughout the state. Promulgation of regulations would also provide individuals such as E.M. and his family with a process for accessing the courts to obtain a decision by a neutral third party where SCDDSN's actions fail to conform to the regulations.

31. E.J.M. has profound mental retardation and was voluntarily admitted to SCDDSN services in 1999. For the next six years, E.J.M. was subjected to repeated physical and psychological abuse at a private facility (the "Private or Contract Provider") funded by SCDDSN. Violations of the human rights of residents of this facility are not reviewed by a Human Rights Committee operated by the county SCDDSN Board. Instead, SCDDSN allows the Private or Contract Provider to operate its own Human Rights Committee (HRC). SCDDSN has not promulgated any regulations with regard to operation of such a committee or with regard to the appeals process to challenge the decision of the Private or Contract Provider's HRC. Thus, E.J.M. has not had access to a HRC through promulgation.

32. E.J.M.'s mother attempted to move him to a safer facility but SCDDSN refused to do so, even to the point of refusing to permit his guardian to terminate SCDDSN services. As SCDDSN does not promulgate regulations with regard to eligibility of services or appeals rights/processes, E.J.M's mother was forced to employ the services of an attorney in order to acquire the needed services in which E.J.M was entitled. Only after E.J.M. incurred significant

legal expenses were these services finally provided. Promulgation of regulations by Defendant would provide E.J.M., his family and others like him with meaningful participation into the rulemaking process, access to information about the agency's rules and eligibility requirements as well as standards for particular services, and ensure that services are provided uniformly and fairly throughout the state. Promulgation of regulations would also provide individuals such as E.J.M and his family with a process for accessing the courts to obtain a decision by a neutral third party where SCDDSN's actions fail to conform to the regulations.

33. K.D.R. is a minor who lives with his parents. As a young child, K.D.R. had developmental delays and was a client of SCDDSN. At age seven, K.D.R. was diagnosed with Asperger's Disorder and continued to receive sporadic services from Defendant. At age nine, despite the fact that his symptoms and difficulties had worsened, SCDDSN cut off K.D.R.'s services, stating he was not qualified to receive them. K.D.R.'s parents were told by a local DSN Board employee that there was no appeal process. However, K.D.R.'s parents persisted and eventually received a determination that K.D.R. was ineligible for services because he did not meet diagnostic criteria for autism or Mental Retardation, and that neither PDD-NOS nor Asperger's were considered "related disabilities". If SCDDSN promulgated regulations as it is required to do, K.D.R., his family and others like him would be provided with meaningful participation into the rulemaking process, access to information about the agency's rules and eligibility requirements as well as standards for particular services, and ensure that services are provided uniformly and fairly throughout the state. They would also have a process for accessing the courts to obtain a decision by a neutral third party where SCDDSN's actions fail to conform to the regulations.

34. S.P began receiving SCDDSN funded residential services in 2003 when he filed a lawsuit against SCDDSN and Defendant Butkus. In 2005 SCDDSN found S.P. to be ineligible for SCDDSN services based on eligibility criteria which are more restrictive than those contained in state and federal law. SCDDSN has failed to promulgate regulations establishing eligibility criteria which comply with state and federal law. In addition, SCDDSN has refused to follow the guardian's wishes in providing appropriate residential services to S.P. SCDDSN has released protected health records to other entities in violation of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") and possibly other state and federal law. See 29 U.S.C.A. § 1181, Pub. L 104-191, August 21, 1996, 110 Stat. 1936. SCDDSN has not promulgated regulations for compliance with HIPAA. Promulgation of regulations by Defendant would provide S.P., his family and others like him with meaningful participation into the rulemaking process, access to information about the agency's rules and eligibility requirements as well as standards for particular services, and ensure that services are provided uniformly and fairly throughout the state.

35. Minor Plaintiff S.S. is currently in an out of home placement, but formerly lived with his mother, stepfather and siblings in their family home. S.S. has been treated for many years for a variety of diagnoses due to unusual and at times unmanageable behaviors, strange thought patterns and, as he has become older, episodes of severe aggression. In 2005, the Medical University of South Carolina evaluated S.S. and diagnosed him with Asperger's Disorder. This disorder, very similar to autism, is one of a group of diagnoses referred to in the DSM IV as "Pervasive Developmental Disorders." S.S. is unable to socialize effectively, has difficulty understanding nonverbal social and other cues, is unable to function effectively in many school and home situations, and requires specialized training and habilitation. Defendant

SCDDSN denied services to S.S., stating only that he did not meet requirements for a diagnosis of Autism. He was not evaluated for "related disabilities" and has never received SCDDSN services.

36. Despite S.S.'s mother's "appeal" to state-level SCDDSN, Defendant has consistently refused to provide services. S.S. has been repeatedly committed to treatment facilities and foster homes because services from the Department of Mental Health have been inadequate for his needs. S.S.'s mother has no access to any formal procedure for challenging Defendant's refusal to provide services. Neither the standards for eligibility and receipt of services nor the grievance process have been subjected to review by the public or the General Assembly. SCDDSN has no regulation or clearly established procedures for appealing the denial of services to an internal or external hearing officer. S.S. and his family have no meaningful access to standards used to determine to which services he may be entitled. Additionally, S.S. and his family have no avenue for appealing any SCDDSN determination regarding services provided, or not, by SCDDSN. Promulgation of regulations by Defendant would provide S.S., his family and others like him with meaningful participation into the rulemaking process, access to information about the agency's rules and eligibility requirements as well as standards for particular services, and ensure that services are provided uniformly and fairly throughout the state. They would also have a process for accessing the courts to obtain a decision by a neutral third party where SCDDSN's actions fail to conform to the regulations.

FOR A CAUSE OF ACTION

DECLARATORY JUDGMENT

37. The allegations of all preceding paragraphs are incorporated as if repeated verbatim herein.

38. That SCDDSN has promulgated only five regulations: R. 88-105, License Requirement for Facilities and Programs; R. 88-210-Definitions; R. 88-310, Recreational Camps for Mentally Retarded Persons; R. 88-405, Day Programs for Mentally Retarded Persons; and R-88-910, Unclassified Facilities and Programs. SCDDSN has never promulgated regulations defining for issues of critical concern to applicants and recipients of its services, including but not limited to eligibility for its services; appeal procedures; standards for the operation of its residential programs; procedures for its Human Rights Committees; and standards for research on human subjects.

39. That SCDDSN's enabling statute requires that the Commission of the SCDDSN promulgate regulations, stating "The commission **shall** determine the policy **and promulgate regulations** governing the operation of the department and the employment of professional staff and personnel." S.C. Code Ann. § 44-20-220 (emphasis added).

40. That SCDDSN is additionally required to promulgate regulations pursuant to S.C. Code Ann. § 44-26-180 ("...The department **shall promulgate regulations** to obtain informed consent and to protect the dignity of the individual.") (emphasis added).

41. Section 44-20-790 of the South Carolina Code of Laws dealing with promulgation of regulations governing hearings provides that "[t]he procedures governing hearings authorized by "Notice of Deficiencies . . ." must be in accordance with regulations promulgated by the department.

42. That the APA was intended to provide a standardized process for all public agencies to formulate rules in order to obtain public comment and to provide access to agencies' operations as well as an avenue for appellate review of administrative decisions.

43. That Defendant Dr. Stan Butkus is the duly appointed Director of defendant SCDDSN, and in such capacity has virtually unfettered and nonreviewable authority over decisions affecting thousands of citizens of this State.

44. That on or about October 24, 2005, Plaintiffs, by and through counsel, delivered to Defendant SCDDSN a letter demanding that regulations be promulgated pursuant to S.C. Code Ann. §§ 1-23-10 *et seq.*, commonly known as the Administrative Procedures Act or APA.

45. That SCDDSN has refused to adhere to its statutory duty to promulgate regulations.

46. That the failure to promulgate regulations under the APA results in Defendant SCDDSN having unfettered decision-making authority, with no opportunity for public participation in the rulemaking process, review by the General Assembly or opportunity for independent judicial review.

47. That such unfettered decision-making authority has marked potential for, and indeed has resulted in, numerous instances of inconsistency, misapplication of the law, failure to provide services, failure to provide adequate services, provision of unequal levels of service coordination and delivery, arbitrary and capricious eligibility decisions, and no avenue for judicial scrutiny of agency decisions.

48. That by failing to promulgate regulations, SCDDSN and the Commission have circumvented not only the requirements of its own enabling legislation, but the requirements of the APA, leaving the public, P&A, the individually named Plaintiffs, defendant's employees, the legislature and the courts with no meaningful access to generally applicable standards which can be judicially reviewed.

49. That Plaintiffs are informed and believe themselves entitled to a Declaratory Judgment requiring that SCDDSN promulgate regulations governing the operation of the department and the employment of professional staff and personnel and to obtain informed consent and to protect the dignity of the individual.

50. That Defendants do not have substantial justification for refusal to promulgate regulations.

51. That attorney's fees and costs have continued to incur in this matter.

52. That upon information and belief, there are no special circumstances which would make an award of attorney's fees and costs unjust.

53. That Plaintiffs are informed and believe they are entitled to an order of this court requiring Defendants to pay Plaintiffs' attorney fees and costs pursuant to S.C. Code Ann. § 15-77-300.

WHEREFORE, Plaintiffs pray this Court for an Order:

1. Declaring that Defendant SCDDSN is required to, and that it shall promptly promulgate regulations governing the operation of the department and the employment of professional staff and personnel, and to obtain informed consent and to protect the dignity of the individual in research settings; and
2. Awarding reasonable attorney's fees and costs to Plaintiffs.

Respectfully submitted,

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April 3, 2007

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Code 1976 § 44-26-70

Code of Laws of South Carolina 1976 Annotated Currentness
Title 44. Health
Chapter 26. Rights of Mental Retardation Clients
→ **§ 44-26-70. Human rights committees.**

(A) Human rights committees must be established for each regional center and for each county/multi-county program to:

(1) review and advise the regional center or the county/multi-county board on the policies pertaining to clients' rights policies;

(2) hear and make recommendations to the regional center or county/multi-county board on research proposals which involve individuals receiving services as research participants pursuant to Section 44-20-260;

(3) review and advise the regional center or county/multi-county board on program plans for behavior management which may restrict personal freedoms or rights of clients;

(4) advise the regional center or county/multi-county board on other matters as requested pertaining to the rights of clients.

(B) Human rights committees must be appointed by the director or his designee. Each committee consists of not less than the following five persons, except employees or former employees of the regional center or county/multi-county board must not be appointed:

(1) a family member of a person with mental retardation or a related disability;

(2) a client of the department, if appropriate;

(3) a representative of the community at large with expertise or a demonstrated interest in the care and treatment of persons with mental retardation or related disabilities.

(C) The department shall establish policy and procedures for the operations of the committees.

(D) Members of the committees serve in an advisory capacity only and are exempt from liability.

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PENGAD 800-631-6989

CREDIT(S)

HISTORY: 1992 Act No. 366, § 1; 1993 Act No. 31, § 1; 1993 Act No. 181, § 1089.

Code 1976 § 44-26-70, SC ST § 44-26-70
Current through End of 2008 Reg. Sess.

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END OF DOCUMENT

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Reference Number:	600-05-DD
Title of Document:	Behavior Support Plans
Date of Issue:	June 1, 1987
Effective Date:	June 1, 1987
Last Review Date:	July 1, 2007 **(REVISED)**
Date of Last Revision:	July 1, 2007
Applicability For Persons Receiving Services in:	Intermediate Care Facilities for Persons with Mental Retardation, Community Day and Residential Programs and Non-Residential Programs
Applicability:	All DDSN and Contracted Providers of Service Coordination, Early Intervention, Residential and Day Services

PURPOSE

To establish the guidelines for building effective positive behavioral supports for people who have challenging behaviors and receive supports from DDSN or its contracted providers. This policy additionally specifies needed approvals for use of behavioral support procedures and identifies those that are prohibited.

PHILOSOPHY

POSITIVE BEHAVIORAL SUPPORT

Positive behavioral support recognizes that people exhibit problem behavior because it serves a useful purpose for them in their current situation. The focus of positive behavioral supports begins with understanding the function of the problem behavior. Once it is known why the problem occurs for an individual, procedures can be developed to teach and promote alternatives that can replace the problem behavior. The goal is not just to eliminate the undesirable behavior. The focus should be to create environments and patterns of support for the person that makes the problem behavior irrelevant, ineffective, or inefficient. The key outcome of positive behavioral supports should be an improvement in quality of life for the person that includes the replacement

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of problem behavior(s) with appropriate alternatives that serve the same purpose. It is the philosophy of DDSN that people will be free from any serious risk to physical and psychological health and safety at all times, including during the development of a Behavior Support Plan. Procedures used to insure safety should not be misunderstood to substitute for procedures to provide positive behavioral supports.

DDSN believes that those who develop behavioral support plans be knowledgeable in the values, theory, and practices of positive behavioral support as provided in the "Functional Assessment and Program Development for Problem Behavior: A Practical Handbook" by O'Neill, Horner et. Al. (Brookes/Cole Publishing Company, 1997) or other similar guides to effective, evidence-based practices in positive behavioral support.

I. STATEMENT OF POLICY

A physical and social environment that is safe, humane, and responsive to a person's needs is a necessary building block for effective supports. Problems or shortcomings in the basic environment must be addressed since effective behavioral support is not likely to occur without an environment that is functional for the person. In order to develop the most effective BSP, the following resources and supports should be available:

A. Environments that make sense for the individual (i.e. providing meaningful support)
*** See Attachment I for more detailed information on each item**

- Meaningful and Individualized Training Opportunities
- Social Interactions
- Activities/Tasks/Work That Are Functional
- Community Inclusion
- Supervision and Accountability of Staff

B. Additional Supports As Needed:
*** See Attachment I for more detailed information on each item**

- Environmental Accommodations
- Medical Diagnosis and Treatment
- Psychiatric Services
- Functional Communication Evaluation and Intervention
- Neuro-Psychological Evaluation
- Psychological Counseling
- Specialized Placements
- Enhanced Staffing

II. DEVELOPING POSITIVE BEHAVIOR SUPPORT PLANS

A. Functional Assessment

Functional assessment is a process for gathering information that can be used to maximize the effectiveness and efficiency of behavioral supports (O'Neill, et. al, 1997, p. 3). It is complete when the following five outcomes have been achieved:

1. The problem behaviors, including classes or sequences of behaviors that frequently occur together are described clearly.

2. The events, times, and situations that predict when the problem behaviors will and will not occur across the full range of typical daily routines are identified.

3. The consequences that maintain the problem behaviors (that is what function{s} the behaviors appear to serve for the person) are identified.

4. One or more summary statements or hypotheses that describe specific behaviors, a specific type of situation in which they occur, and the outcomes or reinforcers maintaining them in that situation are developed.

5. Direct observation data that support the summary statements that have been developed are collected.

Precautionary measures to protect the person and others from harm shall always be taken during the course of functional assessment of problem behavior. A functional assessment will include, but not be limited to the following elements, in conjunction with and to help achieve the five outcomes previously mentioned:

1. An operational definition of the problem behavior(s)in objective and measurable terms.

2. Consideration of the risks of the problem behavior(s) to the person, others, and the environment.

3. Structured interviews with the person, if applicable, staff, family, and/or relevant others who work directly with the person.

4. Consideration of the therapeutic quality of the person's environment including: training opportunities, social interactions, functional activities, environmental accommodations, community inclusion, and training and monitoring of those implementing the plan.

5. Consideration of relevant sensory strengths and deficits.

6. Consideration of the person's functional communication skills.

7. Consideration and assessment when needed of the person's preferences, reinforcers and potential reinforcers.

8. Consideration of the person's sleep and eating patterns.

9. Consideration of the person's physical/medical condition, including medical syndromes that may have an impact on problem behaviors.

10. Consideration of the person's psychiatric condition, if applicable.

11. Consideration of medication effects and side effects.

12. Analysis of objective and measurable data to determine the function that the problem behavior serves for the individual.

13. Identification of appropriate alternative behavior that serves the same purpose (function) as the behavior of concern. This is the replacement behavior.

14. Behavior rating scales/checklists.

15. Historical information from family, previous staff and relevant others.

Documentation: The documents that comprise the functional assessment should be readily available in the behavior support plan.

B. Elements of a Behavior Support Plan

Behavior Support Plans, developed must contain the following elements:

1. Identifying individual information, such as name, age, skills, interests, level of functioning, home address, date of BSP, and signature of the professional who was lead author of the BSP.

2. An operational definition of each problem behavior to be decreased.
   *Can be included in the BSP and/or the person's day or residential plan.

3. An operational definition of each replacement behavior to be increased.
   *Can be included in the BSP and/or the person's day or residential plan.

4. A measurable objective for each problem behavior and replacement behavior with projected completion dates (includes criteria for discontinuation of the objective if it is met within projected date of completion).

5. Procedures for teaching and/or reinforcement of replacement behavior as an alternative for achieving the function of the problem behavior(s).

6. Procedures specific to each problem behavior that specifically addresses prevention, replacement, and management of each problem behavior.

7. The type of data to be collected to assess progress toward the objective(s) for behaviors to be increased and decreased.

8. Provisions, with persons/positions responsible, for training, implementation, review and supervision of the Behavior Support Plan procedures. Training responsibility rests with the BSP author, however approved providers of behavioral supports can train a trainer for a specific BSP (e.g., house manager, service coordinator, etc.) to facilitate the training of all staff who need to implement the behavior support plan. Approval for a local staff member to train others in a specific BSP needs to be documented in writing with the approval for the current plan only. It is expected that anyone providing training on a BSP will be able to provide practical information, answer questions and skillfully demonstrate any procedures included in the plan.

III. USE OF PSYCHOTROPIC MEDICATIONS

Definition: The use of any medication for the primary purpose of affecting overt maladaptive behavior, mood, thought processes, or alleviating symptoms related to a specific diagnosed psychiatric condition.